Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

October Term 1995

JAMES LINSCOMB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the failure to instruct the jury on the "materiality" element of a crime charged under 18 U.S.C. § 1014 reversible constitutional error under *United States v. Gaudin*, 515 U.S.___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)?

2. Is the failure to submit the "materiality" element of a crime charged under 18 U.S.C. § 1014 error that is either harmless or "not plain"?

3. Under *United States v. Gaudin*, 515 U.S.___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), does the failure to submit the issue of materiality to the jury in a Title 18 U.S.C. § 1014 prosecution affect the validity of defendant's convictions under 18 U.S.C. § 371 [Conspiracy to violate § 1014], 18 U.S.C. § 1344 [Bank Fraud], and 18 U.S.C. § 1956(a)(1)(B)(i) [Money Laundering] where those convictions are based, in whole or in part, upon the same false statement that the jury did not find to be material?

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PETITION FOR WRIT OF CERTIORARI

JAMES LINSCOMB respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals, entered on May 26, 1995, is not reported. App. 1a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Fifth Circuit, affirming a judgment of conviction and sentence of the United States District Court for the Northern District of Texas, was entered on May 26, 1995. App. 1a. Petitioner's Motion for Rehearing was timely filed on June 8, 1995. The Order on Rehearing of the Fifth Circuit Court of Appeals was entered August 11, 1995. App. 31a. This petition for certiorari is being filed within 90 days of the August 11, 1995 Order on Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provisions

Title 18 U.S.C. § 1014 provides:

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a

company the corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. § 371, reproduced in its entirety at App. 33a, provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the

United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be [guilty of an offense against the United States].

Title 18 U.S.C. § 1344, which is reproduced in its entirety at App. 34a-35a, provides in pertinent part:

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a federally . . . insured financial institution; or

(2) to obtain any of the moneys . . . or other property owned by or under the custody or control of a federally . . . insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be [guilty of an offense against the United States.]

Title 18 U.S.C. § 1956(a)(1)(B)(i), which is reproduced in its entirety at App. 36a-43a, provides in pertinent part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct a financial transaction which in fact involves the proceeds of specified unlawful activity –

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity shall be guilty of an offense against the United States.

Title 18 U.S.C. § 3013, which is reproduced in its entirety at App. 44a, provides in pertinent part:

(a) The court shall assess on any person convicted of an offense against the United States –

(2) in the case of a felony –

(A) the amount of $50 if the defendant is an individual –

STATEMENT OF THE CASE AND THE FACTS

A. The Procedural History, Charges, Conviction and Sentence

Petitioner James Linscomb is a Texas real estate developer who was charged with Title 18 U.S.C. § 371 Conspiracy, Title 18 U.S.C. § 1344 Bank Fraud, Title 18 U.S.C. § 1014 False Statement to a savings and loan, Title 18 U.S.C. § 215(a)(1) Bank Bribery and Title 18 U.S.C. § 1956(a)(1)(B)(i) Money Laundering. According to the indictment, the conspiracy, bank fraud, and false statement charges arose from the submission of a false loan settlement statement to Bedford Savings and Loan Association which was allegedly designed to deceive Bedford by falsely representing that loan proceeds were being used to pay off a second lien in order to obtain funds for personal use and to pay a bribe to Bedford's Chairman and attorney, Bill Wilder. App. 73a.

Following a jury trial in the United States District Court for the Northern District of Texas, Fort Worth Division, petitioner was convicted on the counts of conspiracy, bank fraud, money laundering (3 counts) and

making a false statement in violation of 18 U.S.C. § 1014. The jury acquitted Petitioner on the charge of bank bribery. The District Court overruled Petitioner's motions for acquittal and for new trial, and sentenced Petitioner to 46 months' imprisonment on the conspiracy, bank fraud and money laundering convictions and to 24 months' imprisonment on the false statement conviction [to run concurrently]. App. 30a. Petitioner was fined under Title 18 U.S.C. § 3013 the sum of $300.00 [$50.00 on each of the six convictions]. App. 29a. Petitioner filed a timely appeal.

In an unpublished opinion dated May 26, 1995, the Fifth Circuit affirmed all of the convictions. App. 1a. Petitioner filed a timely Motion for Rehearing. Shortly after he filed the motion and before it was ruled upon by the Fifth Circuit, this Court issued its opinion in *United States v. Gaudin*, 515 U.S. ___, 115 S. Ct. 2310 (1995), holding that the issue of materiality in a prosecution under Title 18 U.S.C. § 1001 for making false statements on Department of Housing and Urban Development (HUD) loan documents was one for the jury and was not a question of law. Petitioner then filed a Letter Brief raising the *Gaudin* case as grounds for reconsideration. App. 45a. The Fifth Circuit granted leave to file the Letter Brief, and requested and received a responsive brief from the Government. App. 50a. On August 11, 1995, the Fifth Circuit entered an order correcting certain aspects of its prior opinion and otherwise overruling Petitioner's Motion for Rehearing. App. 31a-32a. The order overruling the Motion for Rehearing neither addressed the *Gaudin* issues raised by Petitioner and briefed by both Petitioner and the Government, nor cited any reason for not addressing these contentions. *Id.*

B. Facts

In early 1988, Petitioner James Linscomb began efforts to raise financing to purchase, through his wholly owned corporation, Dizbo, Inc., a tract of land located in Orange County, Texas. The property at that time was owned by Texas Commerce Bank-Beaumont. The bank had acquired the property at a foreclosure sale in 1987 for a minimum bid price of $1,850,000.00, a bid sufficient in amount to completely retire the indebtedness owed to the bank on the property. (Rec. Vol. 5, pp. 25-26). Linscomb was familiar with the property, having held an interest in the corporation which had owned the property prior to the bank's foreclosure. Texas Commerce Bank was willing to sell the property to another company owned by Linscomb, [Dizbo, Inc.], for $1,300,000 cash and a "soft note" (one carrying no personal liability) in the amount of $317,000. (*Id.*)

Linscomb retained Marshall Willey to act as loan broker to locate and obtain financing for the purchase (Rec. Vol. 6, p. 145) as he had done in the past. (Rec. Vol. 6, pp. 132-145). Willey's brokerage commission was to be 10% of the amount of the loan. Willey located a potential source of financing through Bedford Savings Association of Bedford, Texas, ("Bedford") whose chairman was Bill Wilder. The amount of the loan Willey originally requested was $1,300,000. (Rec. Vol. 6, p. 37). According to Wilder's testimony at trial, Wilder and Willey had known each other for 15 or 20 years but Wilder and Linscomb had never met or even talked, and they did not do so at any time during the subsequent handling of the loan negotiations. (*Id.*, pp. 35-36).

Linscomb was manager of timber lands and in charge of real estate sales, as well as business advisor for Foxhall, Inc. Prior to receiving any commitment from Bedford, and operating under the assumption that the loan amount would be $1,300,000, Linscomb made arrangements with Foxhall to loan Dizbo $600,000 for overhead and operating expenses. (Rec. Vol. 6, p. 173); Gov. Ex. "BED 11"). Willey then approached Wilder about increasing the loan amount by $600,000, the amount Foxhall was to advance Dizbo (Rec. Vol. 6, p. 37). Bedford obtained an independent appraisal on the property showing it had a value of $2,400,000 and on March 24, 1988 issued a commitment letter to Dizbo, Inc. agreeing to make the loan in the amount of $1,900,000. The appraised value was never disputed at trial.

On April 28, 1988, Bedford's nine-member loan committee (upon which Wilder did not sit) considered the $1,900,000 loan to Dizbo, Inc. The memorandum reflecting the information the Loan Committee considered showed merely that the borrower was Dizbo, Inc., the loan amount was $1,900,000, and the security on the loan would be a first lien deed of trust. There was no evidence that the loan committee considered any information other than that set forth in this memorandum and the appraisal showing the property had a value of $2,400,000. By unanimous decision, the loan committee approved the loan. (Rec. Vol. 6, p. 5).[1]

Willey suggested to Linscomb that Dizbo loan the excess loan proceeds to Foxhall so that Willey could get a

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[1] The District Court noted in its Opinion that the loan was approved "without any request for Linscomb to detail the way the excess funds would be spent" (Rec. Vol. 3, p. 600; App. 26a).

line of credit established for Foxhall. (Rec. Vol. 6, p. 154). Willey advised Linscomb that he [Willey] would take a loan from Foxhall in lieu of his brokerage commission.

When Linscomb arrived at Sabine Title on May 3, 1988 to close the loan, a preliminary draft of a computer generated disbursement statement had already been prepared by the closer, Roger Conway. The already-prepared HUD statement form used by the title company for all loans showed that the proceeds of the loan in excess of the $1,300,000 purchase were being disbursed as a "refund" to the borrower. (Rec. Vol. 5, pp. 53-55). The statement was subsequently changed and reprinted by the computer to reflect that the excess loan proceeds [of $564,881.84] were being disbursed to Foxhall, Inc. The $564,881.84 disbursement was made to Foxhall by the title company from the loan proceeds. App. 74a. Linscomb testified that he instructed Conway to include the disbursement to Foxhall on the closing statement[but not the "payoff 2d lien" notation]. At some later point – Linscomb testified it was after he signed the closing statement and left Sabine Title's office – Conway rolled the computer-printed closing statement into a typewriter and added the notation that the payment to Foxhall was to "pay off [a] second lien". (Rec. Vol. 5, p. 95) Conway testified that he had no personal recollection of who told him to make the "payoff second lien" notation, (Rec. Vol. 5, pp. 64, 68, 97), and admitted that he would change a closing statement after it had been signed by a party if requested to do so by any one of a number of people, including the lender's attorney (*i.e.*, Wilder). (Rec. Vol. 5, pp. 96-97). Conway also acknowledged that Linscomb had told him that he wanted to use the proceeds to make a loan from Dizbo *to* Foxhall (Rec. Vol. 5, p. 94). On May

5, 1988, Foxhall, Inc. executed a promissory note to Dizbo in the amount of $564,881.84. (Gov. Ex. 9). On the same date Willey executed a note to Foxhall, Inc. in the amount of $200,000 (Gov. Ex. 8).

The Government argued that Linscomb and his alleged co-conspirators had the "pay off second lien" notation added to the closing statement to conceal that there were "excess" funds (i.e., funds in an amount exceeding what was necessary to purchase the property and obtain Bedford's first lienholder status). The Government argued that Linscomb wanted to conceal the excess funds because part of these funds were to be used to pay a "bribe" to Wilder.[2] The settlement statement containing the "payoff second lien" notation was the basis for the charge against Linscomb for making a false statement in violation of 18 U.S.C. § 1014. App. 76a-77a.

The bank fraud count was based, at least in part, upon the same settlement statement that formed the basis of the false statement count in the indictment. App. 75a. In an attempt to differentiate the conduct supporting the false statement charge from the conduct supporting the bank fraud charge, the Government relied upon a credit application and updated financial statements submitted by Linscomb in August, 1988, months after the loan had been funded. There was testimony from a Government witness regarding the circumstances under which this credit application was submitted to Bedford in August, 1988, [over three months after the loan had been funded]. This witness, a Bedford employee in 1988, stated that he noticed that there was no such application at Bedford for

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[2] The jury acquitted Linscomb on the bribery charge.

the Dizbo loan, and that he wanted Linscomb to submit such an application in order to "clean up" Bedford's files. (Rec. Vol. 6, p.8).

C. The Trial Court's Instructions to the Jury and Determination of Materiality as a Matter of Law on the § 1014 Charge

At the time of the trial, it was well established in the Fifth Circuit that the issue of materiality was not one for the jury and was a question of law for the Court to decide. *United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994). Thus, the District Court, consistent with prevailing practice in the Fifth Circuit at the time of trial, did not instruct the jury on the "materiality" element of the crime, but decided that issue as a question of law when Linscomb filed his post-verdict motions. The opinion of the District Court states:

> " . . . The *Court determines* that under the circumstances, *the false statement* on the settlement forms *was material.*"

(Emphasis supplied) App. 20a-21a.

D. The Fifth Circuit's Treatment of the "Materiality" Issue on Appeal

In his appeal to the Fifth Circuit, Linscomb raised five issues, the fourth of which was whether "the prosecution establish[ed] that Linscomb made a materially false statement". App. 58a. (See Excerpts from Linscomb's Brief to the Fifth Circuit). The Fifth Circuit's unpublished opinion affirming Linscomb's convictions

states, incorrectly, that Linscomb appealed his convictions on *four* grounds, omitting from discussion Linscomb's argument that the closing statement was not materially false. App. 2a. With respect to the "materiality" issue, the opinion contains only a conclusory statement in the Court's discussion of sufficiency of the evidence stating that "[Linscomb's] deception [on the settlement statement] was 'clearly material' ". App. 7a.

Linscomb filed a Motion for Rehearing in the Fifth Circuit on June 8, 1995, complaining of, *inter alia*, the Court's failure to adequately address the materiality issue and its holding that the bank fraud charge could be properly supported by acts other than the submission of the false settlement statement. Eleven days later, and prior to the Court of Appeals issuing a ruling on that motion, this Court decided *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Linscomb then promptly filed a Letter Brief in the Court of Appeals expressly raising the *Gaudin* issue, and arguing that the Fifth Circuit should apply the *Gaudin* opinion in his pending appeal. The Fifth Circuit granted leave to file the Letter Brief and solicited a responsive brief from the Government which was filed. App. 50a.

On August 11, 1995, the Fifth Circuit entered its Order on Rehearing, correcting certain aspects of its prior opinion and otherwise overruling Petitioner's Motion for Rehearing. App. 31a-32a. The Order on Rehearing neither addressed the *Gaudin* issues raised by Petitioner and briefed by both Petitioner and the Government, nor cited any reason for not addressing these contentions. *Id.* Thus, the Court of Appeals simply ignored this Court's decision in *Gaudin* that in a Title 18 U.S.C. § 1001 case (false statement to a department or agency of the United States)

the Fifth and Sixth Amendments to the Constitution require the element of materiality to be determined by a jury, not a court.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS IMPORTANT BUT UNANSWERED QUESTIONS OF FEDERAL CRIMINAL AND CONSTITUTIONAL LAW

A. This case presents the important but unanswered question of whether a Defendant charged under 18 U.S.C. § 1014 (making a material false statement to a federally insured savings and loan) has a constitutional right to have a jury determine, beyond a reasonable doubt, his guilt on the element of materiality.

"Materiality" is an essential element of the offense created by § 1014. *United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994).

In *United States v. Gaudin*, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) this Court held that in a prosecution brought pursuant to 18 U.S.C. § 1001 (making a material false statement to a department or agency of the government), a "trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed [the defendant's right to have] a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* at 2320. While on its face *Gaudin* addressed only § 1001 false statements, its rationale is equally applicable to § 1014 false statements. If the Constitution requires that a jury

decide materiality in a § 1001 false statement case, a § 1014 defendant should be accorded the same right. *Gaudin's* reasoning appears to admit of no exception that would suggest that materiality under § 1014 is nonetheless a question of law.

Section 1014 requires, like § 1001, "that the statements be 'material' to the . . . inquiry, and that 'materiality' is an element of the offense that the government must prove," and that "the definition of 'materiality' [is that] the statement must have a 'natural tendency to influence or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.' " *Gaudin, Id.* at 2313; *see also United States v. Williams,* 12 F.3d 452, 456 (5th Cir. 1994) (§ 1014); *see also Porat v. United States,* 515 U.S. ___, 115 S.Ct. 2604 (1995) (vacating and remanding a Third Circuit decision which held among other things, that the element of "materiality" did not have to be submitted to the jury in a trial for making false declarations before the grand jury); *see also, Waldron v. United States,* 515 U.S. ___ (No. 95-167 October 16, 1995 Order List) (vacating and remanding a Fifth Circuit decision in a prosecution under Title 18 U.S.C. § 1014, in light of *Gaudin;* the Fifth Circuit decision rejected Waldron's "materiality is for the jury" argument with only the comment that it was "without merit"). Therefore, the answer in a § 1014 case should be the same as the answer provided by *Gaudin:* the Constitution requires that a jury decide materiality.

B. This case presents the question of whether the failure to submit the "materiality" element to the jury may be error that is either harmless or not "plain", an important question of federal criminal law.

The *Gaudin* case, like Petitioner's, involved a situation in which the appellant did not raise until his appeal, the complaint that it was erroneous to withhold the materiality issue from the jury. The Ninth Circuit held that such error could be raised for the first time on appeal, and that the error was "plain" and not harmless. In his concurring opinion in *Gaudin*, Chief Justice Rhenquist observed that this holding represented an open question not resolved by the Court's opinion affirming the Ninth Circuit's decision:

> "Finally, the Government has not argued here that the error in this case was either harmless or not plain. Brief for United States 8, n. 5. As to the former, there is a 'strong presumption' that a constitutional violation will be subject to harmless-error analysis. [citations omitted] The Court today has no occasion to review the Court of Appeals' conclusion that the constitutional error here 'cannot be harmless' . . . As to the latter, in *United States v. Olano*, 507 U.S. ___, 113 S.Ct. 1770, 1775-1776,-123 L.Ed.2d 508 (1993), the Court noted the limitations on 'plain error' review by the Courts of Appeals under Rule 52(b) . . . The Court, however, does not review the Court of Appeals' determination that the failure to submit the issue of materiality to the jury constituted 'plain error.' " 28 F.3d at 952. *Gaudin, Id.* at 2321.

The Government argued in response to Linscomb's Letter Brief:

> Because the District Court did not specifically withhold the issue of materiality from the jury, Linscomb's only argument is that the false statement instruction for materiality was insufficient. However, Linscomb failed to object to that instruction. *Therefore, the standard of review in the absence of an objection is "under the demanding plain error standard . . .* [citations omitted] *Even under the less daunting harmless error analysis, Id., Linscomb's argument must fail."*

App. 54a (emphasis supplied).

In this case, the Fifth Circuit's response to Petitioner's *Gaudin* argument was, simply, to ignore it. The Fifth Circuit's decision to ignore Linscomb's complaints cannot be squared with the Ninth Circuit's holdings that such error is not harmless and is "plain" in nature. *Gaudin*, 28 F.3d at 943, 952 (9th Cir. 1994) (*en banc*), aff'd, 515 U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *see also United States v. Nash*, 64 F.3d 504, 508 (9th Cir. 1995). In *Nash*, the court reaffirmed that materiality is an essential element of Title 18 U.S.C. § 1014, 64 F.3d at 507, then, noting that an earlier panel had found the error in *Gaudin* to be "structural and plain," the Ninth Circuit found that a *Gaudin* "materiality" error in a § 1014 prosecution satisfied the plain error standard, and reversed the § 1014 convictions.[3]

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[3] *But see United States v. Keys*, ___ F.3d ___, 1995 WL574226 (9th Cir. Sept. 29, 1995) (analyzing claim of *Gaudin* error in a § 1623 perjury case, finding it to be plain error under *Olano*, but exercising discretion not to reverse, because, *inter alia*, the error was "invited" and the case "did not present a 'serious factual question' regarding the omitted element").

Apparently, the failure to submit a required materiality issue to the jury is, in the Ninth Circuit's view, an error of such significance as to "seriously affec[t] the fairness, integrity or public reputation of judicial proceedings." *Gaudin*, 28 F.3d at 952. Yet that same error is, in the Fifth Circuit's view, so trivial as to warrant no discussion. The Fifth Circuit's treatment of Linscomb's *Gaudin* argument was even more perfunctory than that accorded to the Petitioner in *Waldron, supra.* Moreover, the Fifth Circuit's failure to address Linscomb's *Gaudin* argument makes it impossible to determine whether the Fifth Circuit found the Government's "harmless error" analysis persuasive. App. 54a.

If the Fifth Circuit believes that *Gaudin* error need not be noticed if raised for the first time on appeal, it should state as much rather than imply it by silence in an unpublished opinion. Regardless of whether a "plain error" standard should or should not have been applied by the Fifth Circuit, the Fifth Circuit had no reason to simply ignore Linscomb's *Gaudin* argument. As Linscomb pointed out in his Letter Brief to that Court, he was entitled to have the *Gaudin* decision applied to his direct appeal from the judgment of conviction:

> "Ordinarily, a defendant's failure to object would preclude review of an issue on appeal, but an exception to this rule exists where an intervening Supreme Court decision changes the law while the appeal is pending. *United States v. Novey*, 922 F.2d 624 (10 Cir.) cert. denied 501 U.S. 1234, 111 S. Ct. 2861, 115 L.Ed.2d 1028 (1991). When an intervening Supreme Court decision effects a change in the law relied upon by the District Court, the appellate court should apply the new rule enunciated by the Supreme Court

> to all cases pending before it on direct appeal. *United States v. Berkery*, 889 F.2d 1281 (3d Cir. 1989); *United States v. Pervez*, 871 F.2d 310 (3d Cir.) cert. denied 492 U.S. 925, 109 S.Ct. 3258, 106 L.Ed.2d 603 (1989); *United States v. Fitzgerald*, 545 F.2d 578 (7th Cir. 1976); *see also Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379 n. 15 (5th Cir. 1988)".

App. 47a. Thus, the Court of Appeals should have applied the *Gaudin* decision to Linscomb's case which was pending before it on direct appeal; the failure to submit the issue of materiality to the jury on the § 1014 charge constitutes "plain error."

C. This case presents the important question of whether the failure to submit the issue of materiality to the jury in a § 1014 prosecution affects the validity of convictions and sentencing on other counts which are based, in whole or in part, upon the false statement that was the subject of the § 1014 Charge.

Even after the *Gaudin* issue was briefed by both Petitioner and the Government, the Fifth Circuit left intact all of the convictions. Thus, the Fifth Circuit has apparently held, albeit *sub silentio*, that the failure to submit the element of "materiality" to the jury with reference to the § 1014 charge not only did not warrant reversal of that charge, but also did not necessitate a reexamination of the other convictions and sentences imposed upon Petitioner.

In its Reply to Linscomb's Letter Brief, the Government stated:

> "[E]ven if the District Court Judge incorrectly instructed the jury on the false statement count, *the remedy is to vacate only the conviction for the false statement,*" citing *United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993).

(Emphasis supplied). App. 55a. While the Fifth Circuit did not even afford Linscomb the relief the Government admitted would be appropriate for any *Gaudin* error regarding the § 1014 charge, it is by no means clear that the other convictions, i.e., conspiracy [to violate § 1014], bank fraud, and money laundering, would survive reversal of the false statement count, as the Government suggested. Indeed, a determination of *Gaudin* error recently led the Eighth Circuit in *United States v. Wells, infra,* to vacate both a conviction for § 1014 false statement and a § 371 Conspiracy [to make a false statement in violation of § 1014] and to hold that:

> Because the statute requires proof of the materiality of a false statement, materiality is an element of Sec. 1014. *Gaudin,* therefore, dictates that we *vacate* the defendants' convictions *on both counts* I and II and remand the case to the district court for retrial. The trial court's determination of materiality as a matter of law denied the defendants' constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under Sec. 1014 *and under the Sec. 371 charge of a conspiracy to violate Sec. 1014.*

United States v. Wells, 63 F.3d 745, 751 (8th Cir. 1995). (Emphasis supplied). Under the reasoning of *Wells,* reversal of the Petitioner's § 1014 false statement conviction would, at a minimum, require reversal of Petitioner's

§ 371 conspiracy [to violate § 1014] conviction, and would warrant reexamination of Linscomb's convictions on the charges of bank fraud and money laundering which were based upon the false statement subject of the § 1014 conviction. According to the indictment, the false statement regarding the second lien payoff was part and parcel of the alleged conspiracy under 18 U.S.C. § 371. App. 73a. Further, with reference to the bank fraud charge, the indictment alleged that that charge was based on a scheme to (1) bribe Bill Wilder and submit false documentation to Bedford hiding the use of loan proceeds;[4] (2) apply for a loan for the stated purpose of purchasing the property from Texas Commerce Bank; and/or (3) *submit a settlement statement falsely showing a second lien on the property* to conceal the diversion of funds and the $100,000 payment to Wilder.[5] App. 75a-76a. (Emphasis

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[4] It is questionable whether a bribery scheme could constitute a "scheme to defraud" under the bank fraud statute; See *McNally v. United States*, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987) (holding that the federal mail fraud statute, 18 U.S.C. § 1341, did not apply to schemes to deprive another of the intangible right of the honest services of employees). However, not only did the jury acquit Linscomb of bribery, but also the Government conceded at trial that there was "no evidence" Linscomb had any knowledge of any payments to Wilder.

[5] In *United States v. Nash*, 64 F.3d 504, 508, n. 4, the Government argued the false statement convictions should be affirmed because a finding that a statement satisfies § 1344 would necessarily mean that the statement satisfied § 1014.

The Government is in no position to make such an argument in this case, unless it is prepared to concede that the § 1344 and § 1014 convictions were based on the same settlement statement and were multiplicitious. See Linscomb's "Conflict With Seda" discussion, infra at 26. Furthermore, in *Nash*, the jury was instructed on the meaning of materiality under the § 1344

supplied). With regard to the allegation that Linscomb schemed to bribe Wilder, it is important to note that the jury acquitted Linscomb of participation in any bribery. With regard to the allegation concerning Linscomb's application "for a loan for the stated purpose of purchasing the property", the Government's own evidence established that the only "loan application" submitted to Bedford was submitted in August, 1988 (months after the loan had already funded), and was submitted only because of Bedford's desire to "clean up" its files. When viewed in light of the money laundering allegations (see discussion, *infra*), it becomes even more apparent that the jury necessarily relied upon the settlement statement "payoff 2d lien" notation in finding that Linscomb committed the other alleged violations, even though it did not find that statement to be materially false beyond a reasonable doubt.

The District Court instructed Linscomb's jury on the money laundering charge:

> The term "specified unlawful activity" means any act or activity constituting an offense under Title 18, United States Code, Section 1344 (Bank Fraud).

App. 66a-69a (text of jury instruction on the § 1956(a)(1)(B)(i) money laundering charge). As the Fifth Circuit observed in its opinion affirming Linscomb's convictions, two of the elements of the money laundering charge were (1) that the Defendant knew that the property involved in the alleged financial transactions

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instruction, whereas in this case, no such definition was given. App. 64a-66a.

involved proceeds from "specified unlawful activity"; and (2) that the property involved in such alleged transactions did in fact represent the proceeds from the "specified unlawful activity". App. 7a. The indictment alleged that the "specified unlawful activity" *was the bank fraud* alleged in previous counts. App. 78a. According to the indictment, the "financial transactions" that formed the basis of the money laundering charges occurred on May 4 and May 5, 1988. Thus, to prove these allegations the Government was required to show, *inter alia*, that on or before the dates of these transactions, Linscomb or his alleged cohorts had acquired funds from bank fraud, and knew that the funds used in the financial transaction involved the proceeds of the alleged bank fraud.

The jury convicted Petitioner on the money laundering charges. In order to have done so, the jury most probably relied on the settlement statement. This is likely because there was no conduct for which Petitioner could conceivably be held accountable under the bank fraud allegations, *other than the submission of a settlement statement*, that had resulted in any proceeds which could be subject of the "laundering" transactions alleged to have occurred on May 4 or May 5, 1988. While the indictment also alleged that the submission of the credit application in August, 1988 was part of the "bank fraud" scheme, documents submitted to Bedford in August, 1988 could not possibly have formed the basis of the jury's conviction of Linscomb on the money laundering charges based on transactions occurring in May, 1988.

In sum, the Fifth Circuit's silent rejection of Petitioner's *Gaudin* argument not only conflicts with *Gaudin*, but is inconsistent with *Wells*, (where the Eight Circuit, in light of *Gaudin*, vacated not only the § 1014 conviction,

but also vacated a § 371 conspiracy [to violate § 1014] conviction).

A failure to charge the jury under *Gaudin* affects not only the conviction on the count for which the *Gaudin* instruction was required, but also other convictions which relied, in whole or in part, upon the Defendant's guilt of the offense which included material elements which were unconstitutionally determined by the court instead of the jury.

II.

CONFLICT WITH *GAUDIN*

The Court of Appeals' decision affirming Linscomb's convictions did not address the "materiality/*Gaudin* issue, although Linscomb raised the *Gaudin* opinion in his Letter Brief to the Fifth Circuit and was entitled to receive the benefit of *Gaudin*. *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 and 328 (1987).

The silence of the decision below on the *Gaudin* issue does not minimize the decision's conflict with *Gaudin*. Having been squarely presented with the *Gaudin* issue, the court of appeals should have addressed it.

Although the Government had previously conceded the issue of whether "materiality" is an element of a § 1014 offense in this case, in responding to Linscomb's Letter Brief on the *Gaudin* case, the Government states:

> Because materiality is a judge-made limitation and not an element of the statute, there can be no error for failing to submit the issue to the jury.

App. 54a. In *United States v. Wells*, 63 F.3d 745 (8th Cir. 1995), the Eighth Circuit rejected the "materiality is not

an essential element" argument, "explicitly adopt[ing] the rule [it] implicitly acknowledged before, that the 'materiality' of a false statement is an element of proving a violation of § 1014." Indeed, every circuit except the Second Circuit (which has not spoken) is in agreement with that conclusion: "materiality" is an essential element of the government's proof in a § 1014 prosecution.[6] Post-*Gaudin*, the issue is critical to a constitutional analysis of a § 1014 conviction if, as in Linscomb's case, materiality was determined by the court rather than by the jury.[7] App. 20a-21a.

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[6] See *United States v. Ryan*, 828 F.2d 1010, 1014 n. 1 (3rd Cir. 1987) (citing *United States v. Whalen*, 786 F.2d 1229, 1231 (4th Cir. 1986); *United States v. Stephens*, 779 F.2d 232, 237 (5th Cir. 1985)); *United States v. Saniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992) (citing *United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir. 1990); *United States v. Haddock*, 956 F.2d 1534, 1550-51 (10th Cir. 1992)); *see also* cases cited in *United States v. Wells*, 63 F.3d 745 (8th Cir. 1995)

[7] The Government argued in its Reply to Linscomb's Letter Brief [bringing *Gaudin* to the attention of the Court] that the jury was afforded the opportunity to decide the issue of whether the settlement statement had a tendency to influence or was capable of influencing Bedford Savings Association because the District Court did not specifically withhold the issue of materiality from the jury by omitting from its instruction the last part of the Fifth Circuit Pattern jury instruction which provides: "[I]f you find that the government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide. (U.S.Fifth Circuit Judges Association, Pattern Jury Instructions (Criminal Cases) (1990 ed.), p. 131)." This argument must fail; the District Court, not the jury, decided the "materiality" issue as a matter of law in Linscomb's case.

Since the Fifth Circuit panel that decided Linscomb's case did not enunciate any reasoning for rejecting *sub silentio* Linscomb's *Gaudin* argument, it is impossible to determine whether or not the Fifth Circuit found this argument by the Government persuasive. However, since the Government now apparently takes issue with the proposition that materiality is an element of a § 1014 prosecution, such a construction of the statute independently justifies a grant of certiorari. If the Government is correct, ten circuits (including the Fifth Circuit) are wrong.

If materiality is an essential element of § 1014, the Fifth Circuit's affirmance of Linscomb's conviction conflicts with *Gaudin*.

In *Gaudin*, Chief Justice Rhenquist wrote a concurring opinion observing that this Court did not decide in *Gaudin* whether "materiality" was in fact an element of a prosecution under Title 18 U.S.C. § 1001, since the issue had not been raised by the Government. *Gaudin*, 2320. If materiality is not an essential element of a § 1014 false statement violation, this Court should so state, since the issue is now before it.

The decision below conflicts with *Gaudin* because this Court's analysis of the constitutional error in failing to instruct the jury on an essential element of the crime under § 1001 is equally applicable to § 1014. Certiorari should be granted and plenary review accorded Linscomb's claim that *Gaudin* applies to a § 1014 case. *See Porat v. United States*, 115 U.S. ___, 115 S.Ct. 2604 (1995) (vacating a Third Circuit decision holding that "materiality" could be determined as a matter of law in a prosecution under 18 U.S.C. § 1623 – false statement to a

grand jury – granting certiorari, and remanding for consideration in light of *Gaudin).*

III.

CONFLICT WITH *SEDA*

In *United States v. Seda,* 978 F.2d 779 (2d Cir. 1992), the Second circuit considered the issue of whether an indictment may simultaneously charge bank fraud, in violation of 18 U.S.C. § 1344 (1988), and making false statements to a bank, in violation of 18 U.S.C. § 1014 (1988). The Second Circuit rejected the notion that multiple convictions and sentences on these charges was permissible.

Linscomb raised the argument in the trial court that multiple convictions and sentences on the § 1014 and § 1344 counts was in conflict with *Seda,* App. 61a-62a, but the District Court disagreed, App. 14a, and at sentencing imposed a $50.00 special assessment as to each of the six counts upon which Linscomb was convicted (for a total of $300.00). App. 29a. The special assessments under Title 18 U.S.C. § 3013 upon each of the counts of which Linscomb was convicted renders the sentences not concurrent, since Linscomb's liability to pay the $300.00 total special assessment depends on the validity of each count. *Ray v. United States,* 481 U.S. 736, 737, 107 S.Ct. 2093, 2094, 95 L.Ed.2d 693 (1987); *see also Nash,* 64 F.3d 504, 509. *See also Nash,* 64 F.3d at 508, n. 4.

The Fifth Circuit affirmed Linscomb's convictions and sentences on both the § 1014 (false statement) and the § 1344 bank fraud, finding no conflict with *Seda.* The Fifth Circuit attempted to distinguish *Seda* on the grounds that the acts constituting the § 1014 violation were not the "sole basis" of the § 1344 conviction.

The "sole basis" test applied by the Fifth Circuit is invalid. The test for determining whether or not offenses may carry multiple sentences is not whether the acts constituting one offense were the "sole basis" of the other charged offense. A court should first look to legislative intent (first the language of the statutes and then to legislative history) to discern whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively. *Whalen v. United States*, 445 U.S. 684, 691-692 (1980), citing *United States v. Blockburger*, 284 U.S. 299 (1932). Then, if Congressional intent cannot be discerned, the Court applies judicially crafted tests for determining whether multiple convictions and sentences are Constitutionally permissible. In *Seda*, the Second Circuit found that Congress did not intend to permit multiple convictions and sentences on § 1014 and § 1344:

> " 'The broad language of Sec. 1344 was intended to insure that defendants could not slip through the cracks of the statutory scheme. It does not suggest that those who violated Sec. 1014 may also be guilty of a different crime under Section 1344 [quoting the district court conclusions] . . . Here, Congress is making sure that those who submit false loan applications are punished once, if not under the previously enacted false loan application statute, then surely under the newly enacted bank fraud statute.' "

Seda, 978 F.2d at 782, citing Senate Resort at 377, 1984 U.S.C.C.A.N. at 3518. The Second Circuit also rejected the argument that multiple sentences on § 1014 and § 1344 convictions would be permitted under this Court's decisions in *Blockburger, supra*, and *Whalen v. United States*,

445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). In *Seda*, 978 F.2d at 781, the Second Circuit wrote:

> We recognize that some statutes covering a broad range of conduct can apply simultaneously with more focused statutes to result in multiple punishment for one act. . . . Section 1344 is a multifaceted statute, . . . nonetheless broad . . . we have here no realistic likelihood of violating the narrow provision, Section 1014, without also violating the broad provision, Section 1344 . . . [I]n this case, the Government claims that Seda violated Section 1014 by submitting false loan applications and that his submission of these applications constituted bank fraud in violation of Section 1344. *The false loan applications are simply a species of bank fraud . . .* "

(Emphasis supplied).

The Fifth Circuit's opinion affirming the Judgment of conviction and special assessments on multiplictious convictions against Linscomb conflicts with the Second Circuit's opinion in *Seda*. The Fifth Circuit's "sole basis" test for determining whether multiple convictions and sentences may be had ignores the question of Congressional intent. It is also an analytical test that is contradictory to that which has been employed by this Court in determining this issue when Congressional intent is not dispositive. For example, in *Whalen v. United States*, 445 U.S. 684 (1980), this Court held that it was unconstitutional to impose cumulative punishments for convictions on separate statutory offenses of rape and killing the same victim in the perpetration of the rape. This Court found that the imposition of cumulative punishments for the two offenses was contrary to the Double Jeopardy Clause of the Fifth Amendment and held that the rape offense

merged for purposes of punishment with the felony murder offense. In *Whalen* at p. 692, this Court holds:

> " . . . Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed *not to authorize* cumulative punishments in the absence of a clear indication of contrary legislative intent. In the *Blockburger* case the Court held that '[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not [citations omitted]."

The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also protects "against multiple punishments for the same offense." *Whalen* at p. 688.

The Fifth Circuit's decision thus conflicts with the Second Circuit's decision in *Seda* and Linscomb's resulting non-concurrent sentences violate the Double Jeopardy Clause of the Fifth Amendment.

Independently of Petitioner's contentions under *United States v. Gaudin*, this Court should grant certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons certiorari should be granted and this case should be accepted for plenary review. In the alternative, certiorari should be granted and the decision below vacated and remanded for consideration in light of this Court's decision in *Gaudin*.

Respectfully submitted,

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November, 1995

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT MAY 26, 1995

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10594

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES LINSCOMB,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CR-049-02-E)

(Filed May 26, 1995)

Before DAVIS and JONES, Circuit Judges, and CUMMINGS,[1] District Judge.

CUMMINGS, District Judge.[2]

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[1] District Judge of the Northern District of Texas, sitting by designation.

[2] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant, James Linscomb, was convicted of conspiracy, bank fraud, submitting false statements to a federally insured financial institution, and three counts of money laundering. Appellant appeals his conviction on four grounds: (1) the prosecution constructively amended the indictment or created a variance between the factual allegations in the indictment and the theory of the case pursued at trial, (2) the guilty verdicts were not supported by the evidence, (3) the court erred in submitting a "deliberate ignorance" instruction, and (4) the indictment charging both bank fraud and making a false statement to a financial institution was multiplicitous.

CONSTRUCTIVE AMENDMENT

Appellant contends that the government constructively amended the indictment or introduced evidence and arguments materially different from the indictment's allegations. Since Appellant failed to object to any of the evidence presented at trial, the Court utilizes the "plain error standard of review." *United States v. Baytank*, 934 F.2d 599, 606 (5th Cir. 1991); *see United States v. Murry*, 988 F.2d 518 (5th Cir. 1993). Generally, the amendment of an indictment after it has been returned constitutes reversible error. *Stirone v. United States*, 361 U.S. 215 (1960). An amendment occurs "when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993) (quoting *United States v. Baytank*, 934 F.2d 599, 606 (5th Cir. 1991)). Even if the evidence does not amend the indictment, it may constitute a reversible variance if the differences prevent the defendant from adequately preparing his

defense. *United States v. Thomas*, 12 F.3d 1350 (5th Cir. 1994); *United States v. Hernandez*, 962 F.2d 1152, 1159 (5th Cir. 1992).

Count 4 of the indictment charges that Appellant "corruptly gave approximately $100,000.00 to Bill Wilder, an officer of Bedford Savings Association, with the intent to influence and reward him in connection with a $1,900,000.00 loan to Dizbo, Inc. from Bedford Savings Association." At trial, the government contended that Dizbo obtained a $1.9 million loan from Bedford by bribing Wilder with $100,000 from the excess Dizbo loan proceeds. The second loan settlement statement indicates that Foxhall was to receive excess loan proceeds as a payoff of a second lien. Linscomb alleges a constructive amendment of the bank fraud/false statement counts; he claims that because the government failed to prove his knowledge and complicity in the bribery and "second statement" (payoff of second lien to Foxhall) schemes, the prosecutor told the jury in closing argument that such proof was not necessary to convict. We disagree. At trial, the government consistently argued that Appellant signed this second settlement statement. The government never sought to convict Appellant upon any factual basis different than the indictment, but merely utilized these additional arguments to support their contention. Any variance that may have occurred fails to rise to a level that precluded Appellant from adequately preparing his defense.

SUFFICIENCY OF EVIDENCE

Appellant contends that the evidence presented at trial is insufficient to sustain his convictions. When determining the sufficiency of evidence, this Court views the evidence in the light most favorable to the government, drawing all reasonable inferences in favor of the verdict and accepting the credibility determinations of the jury. *United States v. Duncan*, 919 F.2d 981, 989 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2036 (1991); *United States v. Thorn*, 917 F.2d 170, 173 (5th Cir. 1990). The verdict should be sustained if a reasonable trier of fact could have concluded that the evidence established guilt beyond a reasonable doubt. *United States v. Stephens*, 964 F.2d 424, 427 (5th Cir. 1992). The Court will address each of Appellant's six arguments separately.

1) Conspiracy

Three elements must be established for conspiracy: (1) two or more people agreed to pursue an unlawful objective, (2) the defendant voluntarily agreed to join the conspiracy, and (3) one of the members of the conspiracy performed an overt act to further the objectives of the conspiracy. *United States v. Yamin*, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989). The existence of alleged conspiracy may be proven through direct or circumstantial evidence. *United States v. Elam*, 678 F.2d 1234, 1245 (5th Cir. 1982). To establish defendant voluntarily joined the conspiracy, the government must present some evidence that defendant knew the essentials of the conspiracy. *United States v. Holcomb*, 797 F.2d 1320, 1327 (5th Cir. 1986). Defendant need not know very minute detail, but the government must establish that defendant had

knowledge of the conspiratorial agreement and association with the plan. *United States v. Saenz*, 747 F.2d 930, 938 (5th Cir. 1984), *cert. denied sub nom. Solis v. United States*, 473 U.S. 906 (1985).

Appellant contends that the government failed to establish that he agreed to do anything other than obtain a legal loan from Bedford. Appellant's false statement on the loan settlement sheet, his subsequent actions with the loan proceeds, his participation with Willey in procuring a $1.9 million loan to purchase property worth only $1.3 million, and disbursing these proceeds as a bribe to Wilder, provide ample evidence that the defendants agreed to commit certain illegal acts. Appellant's conduct was voluntary, he clearly benefited from it, and overt acts were committed in the furtherance of the conspiracy.

2) Bank Fraud

Appellant argues that there is no proof to support his bank fraud conviction, because he never told the bank that all of the funds would be used to purchase the Dizbo property. Appellant signed the settlement statement, which clearly indicates that the funds from the loan would be used to purchase the property. At trial, both Jones and Taner [sic] testified that this second settlement statement deceived Bedford and that Bedford would not have funded the loan without knowing the ultimate use of the proceeds. There was sufficient evidence for the jury to conclude that Linscomb was knowingly involved in bank fraud.

3) False Statements

In order to establish a violation of 18 U.S.C. § 1014 for providing false statements to procure a loan, the government must establish that defendant (1) knowingly, (2) made a false statement or report, (3) for the purpose of influencing in any way the action of a federally insured financial institution upon any application, advance, commitment, or loan, and (4) the false statement must be material. *United States v. Thompson*, 811 F.2d 841 (5th Cir. 1987). To establish the second element, it is sufficient to demonstrate that at the time the financial statement was made, the defendant had a reasonable expectation that it would reach a federally insured institution and that the defendant intended to influence the institution. *United States v. Gammage*, 790 F.2d 431, 433 (5th Cir. 1986). Furthermore, the government need only establish that the statement was capable of influencing the institution; no proof is required to show actual fraud on or reliance by the institution. *United States v. Trice*, 823 F.2d 80, 85 (5th Cir. 1987). The test for materiality is whether the fact misrepresented had a natural tendency to influence or was capable of affecting or influencing the agency to which it was made. Lack of success is irrelevant.

At trial, Jones and Tanner testified that the second loan settlement statement, signed by Linscomb, deceived them concerning the true use of the Dizbo proceeds. In addition, the settlement statement provided to Bedford failed to disclose that the borrower received cash back from closing and that all of the loan proceeds were not being used to purchase the property. This statement was signed by Appellant. Appellant attempted to rebut the statement by arguing that someone added the words

"payoff the 2nd lien" after Appellant signed the settlement statement. This was contradicted by several witnesses. Specifically, Roger Conway testified that he typed "payoff second lien" and that he would never add anything to a settlement agreement after it was signed without consent of the signatory. Appellant's deception was clearly material.

4) Money Laundering

Four elements must be established for money laundering: (1) the defendant knowingly conducted or attempted to conduct a financial transaction; (2) the defendant knew that property involved in the transaction involved proceeds from an unlawful activity, (3) the property involved in the transaction represented proceeds from a specified unlawful activity, and (4) the defendant engaged in the transaction knowing that the transaction was designed to conceal or disguise the location, source, ownership, or control of the proceeds from the specified unlawful activity. Title 18, United States Code, section 1956(c)(7)(D) lists bank fraud as a specified unlawful activity. *United States v. West*, 22 F.3d 586, 590-91 (5th Cir. 1994).

The evidence clearly established Appellant was guilty of money laundering. In addition, Appellant directed the loan transactions designed to conceal the proceeds obtained through the bank fraud. These transactions were designed to conceal or disguise the source, ownership, nature and control of the proceeds.

5) Aiding & Abetting

Pursuant to Title 18, United States Code, Section 2(b), a defendant is guilty of aiding and abetting an offense when he purposefully participates in a criminal venture and attempts to make it succeed through his actions. *United States v. Pena*, 949 F.2d 751, 755 (5th Cir. 1991). To establish aiding and abetting, the government must prove that the defendant (1) committed an act contributing to the execution of a crime, and (2) intended to aid in its commission. *United States v. Stanley*, 765 F.2d 1225, 1242 (5th Cir. 1985). A defendant may be found guilty of aiding and abetting if he did not directly act himself, but causes an innocent party to commit the act. See *United States v. Levy*, 969 F.2d 136, 141 (5th Cir.), *cert. denied sub nom. McNaughton v. United States*, 113 S.Ct. 829 (1992).

Appellant negotiated the purchase price of the Dizbo property, recruited Willey to obtain the loan, received the loan, benefited from the proceeds, signed the changed settlement statement showing the disbursement of proceeds, and directed the payment of funds from the loan. This evidence is clearly sufficient to establish that Appellant participated in the criminal venture and intended to make it succeed.

6) Federal Insurance

Finally, Appellant argues that the district court lacked jurisdiction because it failed to prove that Bedford was insured by FSLIC. At trial, Government's Exhibit 1 was admitted without objection. It clearly indicates that Bedford was insured between February 28, 1985, and August 8, 1989. Appellant's argument is without merit.

Thus, the evidence is sufficient to support the Appellant's conviction.

DELIBERATE IGNORANCE INSTRUCTION

Appellant contends that the trial court erred in submitting a "deliberate ignorance" instruction to the jury. Although a "deliberate ignorance" instruction should rarely be given, it is appropriate when the defendant claims a lack of guilty knowledge and the evidence admitted at trial supports an inference of deliberate ignorance. *United States v. Faulkner*, 17 F.3d 745, 766-68 (5th Cir. 1994). Thus, when the evidence infers that (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct, and (2) the defendant purposely contrived to avoid learning of the illegal conduct, the instruction is appropriate. *Id.*

The evidence clearly indicates that the Appellant knew that the transaction involved a high probability of illegal conduct. Appellant never disclosed how the excess loan proceeds would be used. Additionally, Appellant altered the first settlement statement so that the second statement directed the payment of excess loan proceeds to Foxhall, and Appellant failed to submit a loan application until after closing. At trial Appellant attempted to argue that Willey was responsible for these actions. Given Appellant's expertise in real estate, his prior dealings with banks on large real estate loans, and his extensive knowledge of lending requirements, the evidence was sufficient to raise an inference that he was subjectively aware of a high probability of illegal conduct in obtaining

the Dizbo loan. Likewise, the evidence supports an inference that Appellant attempted to shield himself from learning about illegal conduct through the utilization of Willey. The trial court did not err in submitting the deliberate ignorance instruction.

"MULTIPLICITOUS" CONVICTIONS

Finally, the Appellant's convictions for bank fraud and making false statements are not multiplicitous, because the submission of false statements was not the sole basis for the bank fraud count. The bank fraud conviction was based upon a course of fraudulent conduct that was intended to secure the loan. His actions went beyond Appellant's false statements. Therefore, *United States v. Seda*, 978 F.2d 779 (2d Cir. 1992), is distinguishable. Appellant's argument on this point is without merit.

For the reasons stated, Appellant's conviction by the District Court is AFFIRMED on all counts.

APPENDIX B – OPINION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO.
	§	4:93-CR-49-E
JAMES LINSCOMB	§	

ORDER

(Filed Jun. 17, 1994)

Defendant James Linscomb has moved for arrest of judgment, a judgment of acquittal or, in the alternative, a new trial. For the reasons discussed below, the Court denies each of the motions.

Linscomb was indicted on one count each of conspiracy, bank fraud, making a false statement to a federally insured bank, and bribery, and three counts of money laundering. The charges were based on Linscomb allegedly having conspired with Marshall Willey, a cousin and good friend, to obtain through improper means a loan to finance the purchase of property previously foreclosed on due to the default of a company run by Linscomb. The loan Willey and Linscomb secured was from Bedford Savings Association ("Bedford"). After a trial lasting approximately four days, a jury convicted Linscomb on all but the single count of bribery.

A. Motion for Arrest of Judgment

1. Whether Bedford was federally insured

Linscomb argues that the Court lacked jurisdiction with respect to some or all of the counts because the government failed to prove that Bedford was insured by the Federal Savings and Loan Insurance Corporation ("FSLIC") at the time of the events in question, specifically in April and May 1988. This argument fails in light of the government's evidence.

The government introduced Exhibit 1, an original certificate under seal signed by Ralph E. Maxwell, Chief, Supervisory Records, Office of Thrift Supervision, to which a Certificate of Insurance for Bedford was attached. Maxwell certified that the attached Certificate of Insurance was a true copy made from records of the Office of Thrift Supervision. The Certificate of Insurance was executed on June 13, 1988 and stated, in the same typeface as the date and certificate number, "originally issued on February 28, 1985." Linscomb did not object to this exhibit being entered into evidence.

Linscomb does not claim Exhibit 1 was inadmissible, but instead contends it was insufficient proof of Bedford's insured status. Where a party claims insufficiency of the evidence, the Court "must review all of the admissible evidence and the reasonable inferences which flow therefrom in a light most favorable to the verdict to determine whether a reasonable trier of fact could find that evidence established [the facts to be proven] beyond a reasonable doubt." *United States v. Schultz*, 17 F.3d 723, 725 (5th Cir. 1994).

The Certificate of Insurance was unquestionably admissible without supporting testimony as a certified copy of a public record. *See* Fed. R. Evid. 803(8), 902(1) and (4). Viewed in a light favorable to the verdict, the uncontradicted contents of the Certificate were sufficient to permit the jury to reasonably conclude that Bedford was insured by the FSLIC when the conduct for which Linscomb was convicted occurred. *See United States v. Maner,* 611 F.2d 107, 109-11 n.1 (5th Cir. 1980) (reviewing cases where evidence of federal insurance was held sufficient).

Linscomb suggests that in this event, admission of Exhibit 1 violated his Sixth Amendment right to confront the witnesses.[1] The Court finds no such violation. Although the Certificate of Insurance, alone, was adequate proof of insurance at the relevant time, a former president and a former manager of Bedford each testified that Bedford was federally insured. Linscomb had an opportunity to cross-examine them regarding Exhibit 1 and the issue of insurance, but made no attempt to do so. His belated attempt to raise this issue as a bar to his convictions is denied.

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[1] Linscomb challenges in particular a statement included in Maxwell's certification to the effect that the Certificate of Insurance was originally issued on February 28, 1985 and Bedford was continuously insured by the FSLIC from that date until August 8, 1989. Although this statement may have been inadmissible and warranted a limiting instruction, Linscomb did not request such an instruction and the Court finds that its entry into evidence was not prejudicial since the Certificate of Insurance, which was admissible, contained essentially the same information.

2. Multiplicity of Counts 2 and 3

Linscomb cites *United States v. Seda*, 978 F.2d 779 (2d Cir. 1992) for the proposition that Counts 2 and 3, respectively those for bank fraud and making a false statement to a bank, are multiplicitous. On this ground, Linscomb seeks to have one of the two counts vacated.

In *Seda*, the defendant was charged with making false statements on several loan applications, preparation and submittal of which were also the sole basis of several bank fraud counts. Here, by contrast, Linscomb's making of a false statement on the May 3, 1988 loan settlement statement, which is the basis for Count 3, was not the sole basis for the bank fraud count. Rather, that count was based on a course of fraudulent conduct over several months that was intended to secure a loan for purposes other than those made known to the bank.[2] Thus, proof of the May 3 false statement was not a necessary element of the bank fraud charge. Accordingly, the Court finds that neither count need be vacated.

B. Motion for Judgment of Acquittal

Linscomb contends there was insufficient evidence to convict him on each of the counts. When confronted with such a challenge, the Court must sustain a guilty verdict if any rational jury could have found the essential elements of the crime beyond a reasonable doubt. The evidence and any inferences that may be drawn from it must

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[2] A brief description of the facts concerning how the Bedford loan was obtained is provided later in this opinion.

be viewed in favor of the verdict. *United States v. Duncan*, 919 F.2d 981, 990 (5th Cir. 1990), *cert. denied*, 500 U.S. 926 (1991); *United States v. Thorn*, 917 F.2d 170, 173 (5th Cir. 1990). The standard of review is the same whether the evidence is direct or circumstantial. *United States v. Bryant*, 770 F.2d 1283, 1288 (5th Cir. 1985), *cert. denied*, 475 U.S. 1030 (1986). Neither the jury nor the Court is required to examine each circumstance in isolation. *Duncan*, 919 F.2d at 990.

The Court finds that, viewed in totality, there was sufficient evidence to convict Linscomb on each count. The evidence showed that beginning in 1977, Linscomb ran a corporation, Texla Land, of which he was also part-owner. In 1981, Texla Land obtained a loan of approximately $2 million from Texas Commerce Bank ("Texas Commerce"), with which it purchased property for development (the "Dizbo property"). Texla Land did not make its payments on the loan and in May 1987 Texas Commerce foreclosed on and purchased the property. Linscomb then negotiated with Texas Commerce to again purchase the Dizbo property for $1.3 million. The bank, which was having financial problems, was willing to sell the property to Linscomb only for cash; it did not want to take the risk of making a new loan and again having to foreclose.

Linscomb asked Willey to help him obtain a loan. In addition to the actual purchase price of the Dizbo property, Linscomb wanted funds for his own use. He formed a new company for purposes of obtaining the new loan. Willey went to an old friend of his, Bill Wilder, who was president of Bedford. Bedford was located far from the Dizbo property and ordinarily would not have made a

loan for the area in which the property was located. Willey agreed to give Wilder $100,000.00 if Bedford loaned Linscomb the money to purchase the property. Linscomb agreed to pay Willey $200,000.00 in exchange for helping obtain the loan.

The Loan and Credit Summary upon which Bedford's loan committee based its consideration of the loan listed the proposed loan as one for $1.9 million and stated that the purpose of the loan was to refinance an existing loan with Texas Commerce. The Summary did not indicate that the property had already been foreclosed on and was in effect being repurchased by the defaulting party. As a result, there was no indication that the loan would actually include significant funds in excess of those required for the purchase Linscomb had negotiated. The loan committee approved a $1.9 million loan on April 28, 1988.

The loan settlement papers prepared by Linscomb's title company revealed that $1.3 million of the loan was to be used to purchase the Dizbo property from Texas Commerce. The papers originally showed that the difference between the property purchase price and the full amount of the loan, just under $600,000.00, was going to the borrower, Linscomb. At Willey's advice, however, Linscomb directed the title company to change the papers and show the excess funds going to Foxhall, Inc., a company owned by a friend of his. Although Linscomb testified that the money going to Foxhall was a loan, he did not indicate that on the settlement papers. Instead, the final papers which Linscomb signed on May 3, 1988 stated that the excess funds were going to Foxhall to pay off a second lien. Bedford's records contained a promissory note to Foxhall signed by Linscomb for $600,000, shown

as paid on May 3, 1988, the day Linscomb received the Bedford funds. The note apparently was intended to support the representation that Foxhall had a second lien on the Dizbo property. In fact, there was no second lien on the property, and Linscomb stated at trial that the loan for which the promissory note was signed was never consummated.

Upon receipt of the excess loan funds, Linscomb directed his secretary to disburse them through Foxhall in various directions. He had $200,000.00 of the funds sent to an escrow account in a second title company, from which Willey was then able to withdraw the money. Willey, in turn, gave $100,000.00 to Wilder. Linscomb made use in various ways of the approximately $400,000.00 originally put in accounts in Foxhall's name. Yet when Linscomb belatedly filed a loan application form in August 1988, he stated only that the proceeds of the loan were to be used to purchase the Dizbo property.

1. Conspiracy and bank fraud

To support Linscomb's conviction on Count 1 for conspiracy under 18 U.S.C. § 371, the government had to prove: (1) an agreement between two or more persons, one of whom was Linscomb, (2) to commit a crime against the United States; and (3) an overt act by one of the conspirators in furtherance of the agreement. *Thorn*, 917 F.2d at 173. If Linscomb understood the unlawful nature of the activity and knowingly or intentionally joined it on at least one occasion, then he could be convicted of the conspiracy even though he wasn't involved in every part of the scheme. *See id.* Because a conspiracy

is almost always formed in secrecy and often cannot be proved by direct testimony, existence of the common purpose may be established by inferences drawn from circumstantial evidence. *Duncan*, 919 F.2d at 991. *See also Thorn*, 917 F.2d at 173.

Linscomb's conviction on Count 2, under 18 U.S.C. § 1344, required proof of the knowing or attempted execution of a scheme or artifice to defraud Bedford, a federally insured financial institution. The term "scheme to defraud" includes "any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived." *United States v. Saks*, 964 F.2d 1514, 1519 (5th Cir. 1992).

The evidence presented was sufficient for the jury to conclude beyond a reasonable doubt that Linscomb, knowing it would be difficult if not impossible to get a loan for property his company had already defaulted on once, agreed with Willey to take whatever steps necessary to procure a loan, including steps he knew to be illegal. The evidence was sufficient to show that, as part of the conspiracy, Linscomb and/or Willey withheld and/or misrepresented information regarding the history of the Dizbo property. Further, the evidence showed Linscomb, with agreement from Willey, made several misrepresentations to Bedford regarding the purpose of the loan, omitting disclosure of the true use to which the excess funds would be put. This evidence more than adequately supported conviction on both the conspiracy and bank fraud counts.

2. False statement

For Count 3, the charged violation of 18 U.S.C. § 1014, the government had to prove Linscomb knowingly made a false statement or report for the purpose of influencing the action of a federally insured institution upon an application or loan.[3] *Williams v. United States*, 458 U.S. 279, 284, 102 S.Ct. 3088, 3091 (1982); *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986). In addition, under Fifth Circuit precedent, the government had to prove that the false statement concerned a material fact. *Id.* at 1197, 1199; *United States v. Thompson*, 811 F.2d 841, 843 (5th Cir. 1987).

At trial, Linscomb claimed that when he signed the May 3, 1988 loan settlement statement, it stated only that the excess funds were going to Foxhall. He denied any knowledge that the words "payoff 2nd lien" were added, asserting that the title company must have added those words after he left without his approval. There was adequate circumstantial evidence to support the conclusion that Linscomb lied in this regard. Moreover, even without the additional words, Linscomb, who admitted he directed that "Foxhall, Inc." be shown on the statement as the recipient of all the excess loan funds, knowingly made a false statement. Linscomb knew at the time he signed the statement that $200,000 of the excess funds

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[3] In the motion for acquittal, Linscomb repeats his argument that the government did not prove Bedford was an [sic] federally insured institution. The Court has already rejected that argument.

would actually be going to Marshall Willey, as he admittedly had promised Willey that amount.[4] This evidence was sufficient to support Linscomb's conviction for making a false statement.

Linscomb contends that even if he made a false statement on the settlement forms, the statement could not be material because the bank had already approved the loan several days earlier. Materiality does not require actual reliance by the lending institution, however. *United States v. Williams*, 12 F.3d 452, 456 n.14 (5th Cir. 1994); *Bowman*, 783 F.2d at 1199. Rather, a false statement is material if it is *capable* of influencing a decision of the lending institution. *Williams*, 12 F.3d at 456. There is no question that a bank's decision to fund a loan could, and with few if any exceptions will, be affected by the use to which the proceeds are to be put. Here the evidence showed that Bedford's approval of the loan was based on misrepresentations and omissions regarding the purpose of the loan. The settlement forms, which could have set the record straight as to the purpose of the loan, and also could have provided a basis for the bank to recall or change the conditions on the loan, again concealed and misrepresented the purpose of more than one-quarter of the loan. One of the bank employees involved in approving the loan testified that the bank would not have loaned Linscomb the money knowing that part of the funds were to be used to make a loan to a second company. The Court

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[4] That Linscomb carefully funneled the excess funds through Foxhall and then on to Willey does not change the analysis. In fact, it supports the money laundering counts, discussed below.

determines that under the circumstances, the false statement on the settlement forms was material.

3. Money laundering

Conviction of Linscomb under 18 U.S.C. § 1956 on the three counts of money laundering required proof that he knowingly conducted or attempted to conduct transactions involving the proceeds of unlawful activity, knowing the transactions were designed at least in part to conceal or disguise the nature, source, ownership or control of the those [sic] proceeds. Linscomb contends he could not be convicted of money laundering because there was insufficient proof that he knew the excess loan funds were the proceeds of unlawful activity. Specifically, Linscomb asserts that since there was insufficient proof of bank fraud, there must also have been insufficient proof of money laundering. The Court already having determined there was adequate proof of bank fraud, as well as of conspiracy and making a false statement, this argument is easily rejected. In any event, the inexplicably circuitous nature of the transactions Linscomb conducted with the excess loan proceeds, particularly those destined for Willey, was highly probative of the necessary elements of the money laundering counts.

C. Motion For a New Trial

Providing for the event that his motion for an acquittal might be denied, Linscomb has moved for a new trial on several grounds: (1) that the verdicts were against the weight of the evidence; (2) erroneous entry into evidence

of certain inadmissible materials; (3) prosecutorial misconduct; and (4) inclusion in the charge of an improper instruction. None of these grounds justifies a new trial.

1. Weight of the evidence

Determination of whether to grant a new trial pursuant to Fed. R. Crim. P. 33 is within the discretion of the trial judge. *United States v. Williams*, 613 F.2d 573, 575 (5th Cir.), *cert. denied*, 449 U.S. 849 (1980). Nevertheless, a new trial based on the weight of the evidence should be granted only in those exceptional circumstances where the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985); *United States v. Sinclair*, 438 F.2d 50, 51 n.1. (5th Cir. 1971).

As discussed earlier, there was substantial evidence supporting Linscomb's conviction on each count and the Court cannot find that the verdicts were against the great weight of the evidence. A new trial would not be appropriate where a jury has already once made a determination based on a reasonable assessment of the evidence.

2. Inadmissible evidence and prosecutorial misconduct

Linscomb claims that the Court erred in permitting the entry of a financial statement of Willey that was in the files of Texas Commerce. The statement, made in 1985, indicated that Willey owned a 30 percent interest in Texla

Land, the company that first purchased the Dizbo property. Linscomb now contends this document was hearsay, which he was unable to rebut through cross-examination.

Linscomb did not object when the government questioned an officer of Texas Commerce regarding Willey's financial statement, including the representation regarding Willey's partial ownership of Texla Land. Although Linscomb subsequently objected to entry of the document into evidence, he did not do so on hearsay grounds, but because the document had not been submitted in connection with Texas Commerce's original loan for the Dizbo property and therefore could not have played a role in the bank's granting of that loan. When the government explained that the document was relevant because it showed Willey was a partner in Texla Land, Linscomb made no further objection.

Objections to the admission of evidence are preserved only if they are timely and state the specific ground of objection. *Wilson v. Attaway*, 757 F.2d 1227, 1242 (11th Cir. 1985); *United States v. Adamson*, 665 F.2d 649, 660 (5th Cir. Unit B 1982), *cert. denied*, 464 U.S. 833 (1983). Where there has not been a proper objection, a court reviews an alleged error under the plain error standard, determining whether the error seriously affected the defendant's substantial rights. Plain error is an error so obvious that failure to notice it would seriously affect the fairness or integrity of the proceedings and result in a miscarriage of justice. *United States v. Murray*, 988 F.2d 518, 523 (5th Cir. 1993).

Because Linscomb did not make an objection to Willey's financial statement on hearsay grounds, the

Court reviews this alleged error under the plain error standard. Even if the statement was hearsay, Linscomb has not shown that admission of the document was seriously prejudicial to his rights in any way. Willey's partial ownership of Texla Land was not essential to the verdicts, as the evidence to support conviction was more than adequate without that fact. Moreover, other evidence, indisputably admissible, corroborated Willey's ownership of a part of Texla Land. An officer of Texas Commerce testified that Willey was one of the owners of Texla Land and was generally present with Linscomb in meetings regarding the loan on the Dizbo property. In addition, although during trial Linscomb denied Willey owned any part of Texla Land and testified that he, Linscomb, owned 75 percent, with another man owning the remaining 25 percent, Linscomb's own financial statement showed he owned only 30 percent of the company. The latter figure was in keeping with Willey's statement that he owned 30 percent, and would have been reasonable for a three-way partnership.

Linscomb argues that the government also was improperly permitted to introduce evidence of questionable transactions involving the proceeds of the Bedford loan by several entities with names similar to companies owned by Linscomb, but in fact not connected with him in any way. Linscomb further complains that the prosecutor engaged in misconduct when he included in his cross examination and opening and closing arguments questions regarding Linscomb's use of various corporate entities and procedures to benefit himself and avoid personal liability, while inflicting losses on the respective lenders.

Linscomb did not object to the prosecutor's evidence or statements during trial.

Reviewing the alleged errors under the plain error standard, the Court finds that Linscomb's substantial rights were not seriously prejudiced and that a new trial is not warranted on these grounds. The government's evidence regarding transactions involving other companies merely showed where the proceeds of the Bedford loan went. Linscomb has not pointed to any misrepresentation by the government regarding the ownership of the entities involved. Similarly, Linscomb has not shown that the prosecutor's references to his financial dealings and lack of a sense of personal obligation were improper. The questions and references of this nature were relevant to Linscomb's business knowledge and methods and reflected on the credibility of his claim to be unaware of and uninvolved in obtaining the Bedford loan through fraudulent means.

3. Erroneous instruction

Linscomb challenges the Court's inclusion in the jury charge of the following instruction:

> When considering each count, you may find that James Linscomb had knowledge of a fact if you find that James Linscomb deliberately closed his eyes to what otherwise would have been obvious to him. While knowledge on the part of James Linscomb cannot be established merely by demonstrating that James Linscomb was negligent, careless, or foolish, knowledge can be inferred if James Linscomb deliberately blinded himself to the existence of a fact.

Linscomb concedes that this instruction is included in U.S. Fifth Circuit District Judges Association, Pattern Jury Instructions, Criminal Cases (1990), but notes that it is expressly meant to be used only sparingly. In this case, Linscomb argues, the facts do not justify use of the instruction.

The Court disagrees. In order to give a deliberate ignorance instruction, the evidence must show that the defendant: (1) was subjectively aware of a high probability of the existence of the illegal conduct; and (2) purposely contrived to avoid learning of that conduct. *United States v. Faulkner*, 17 F.3d 745, 766 (5th Cir. 1994). Linscomb's defense in this case was, in essence, that although Willey clearly engaged in various illegal actions with respect to the Bedford loan, Linscomb had given Willey all responsibility for obtaining the loan and had no knowledge of or involvement in any improper conduct. There was evidence, however, of a number of circumstances that should have alerted Linscomb to the means by which the loan was procured, for example: the speed with which the loan was approved; the fact that a loan was obtained from a bank far outside the location of the property; the approval of a loan significantly in excess of the amount of the purchase price of the property, without any request for Linscomb to detail the way the excess funds would be spent; and the failure of the bank to require a loan application prior to approving the loan. This evidence, in conjunction with Linscomb's acknowledged business expertise and carefully choreographed steps in disbursing the excess loan proceeds, suggested a high probability he was aware that something about those proceeds was not legal. Similarly, where despite his

business savvy Linscomb claimed to be an ignorant and innocent naif when it came to the Bedford loan, the jury could find that Linscomb, if he did not have actual knowledge of the illegal conduct involved, must have purposely contrived to avoid such knowledge. The government was entitled to the deliberate indifference instruction.

CONCLUSION

Linscomb has failed to show any error in his trial that justifies the relief he seeks. Accordingly, the Court ORDERS that Linscomb's motions for arrest of judgment, a judgment of acquittal and a new trial are DENIED.

Signed this 17th day of June, 1994.

/s/ Eldon B. Mahon
ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

APPENDIX C – JUDGMENT OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

UNITED STATES DISTRICT COURT
NORTHERN District of TEXAS

UNITED STATES OF AMERICA V. JAMES LINSCOMB	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) (Filed June 21, 1994) Case Number: 4:93-CR-049-E (2)
(Name of Defendant)	Phil Burleson, Retained Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) 1, 2, 3, 5, 6, & 7 of Indictment filed 4/22/93 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	CONSPIRACY	1 – 5/88	1
18:1344	BANK FRAUD	1/88 – 5/5/88	2
18:1014	FALSE STATEMENT TO SAVINGS AND LOAN	5/3/88	3
18:1956(a)(2)(B)(i) & 2	MONEY LAUNDERING	5/5/88	5, 6, 7

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 4 of the Indictment filed 4/22/93, and is discharged as to such count.

[ ] Count(s)_____(is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $300.00, for count(s) 1, 2, 3, 5, 6, & 7 of Indictment, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States District Clerk for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 465-82-5008

Defendant's Date of Birth: 12/13/49

Defendant's Mailing Address:

620 Horshoe Bend
Orange, Texas 77632

Defendant's Residence Address:

June 17, 1994
Date of Imposition of Sentence

/s/ Eldon B. Mahon
Signature of Judicial Officer

Eldon B. Mahon, U.S. District Judge
Name & Title of Judicial Officer

June 21, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 46 months on each of Counts 1, 2, 5, 6, and 7 to run concurrently with each other. The defendant is sentenced to 24 months on Count 3 to run concurrently with the sentence imposed in Counts 1, 2, 5, 6, and 7.

[ ] The court makes the following recommendations to the Bureau of Prisons:

The defendant shall be released on a $15,000.00 cash or surety bond pending appeal.

* * *

APPENDIX D – ORDER ON REHEARING OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT, AUGUST 11, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10594

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES LINSCOMB,

Defendant-Appellant.

ORDER ON REHEARING

(Filed Aug. 11, 1995)

Before DAVIS and JONES, Circuit Judges, and CUMMINGS, District Judge.*

BY THE COURT:

Appellant's motion for rehearing is granted to the following extent. The word "worth" in the second sentence of the second paragraph on page four of the opinion is replaced by "at a purchase price of." The sentence now reads:

> Appellant's false statement on the loan settlement sheet, his subsequent actions with the loan

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* District Judge of the Northern District of Texas, sitting by designation.

> proceeds, his participation with Willey in procuring at $1.9 million loan to purchase property at a purchase price of only $1.3 million, and disbursing these proceeds as a bribe to Wilder, provide ample evidence that the defendants agreed to commit certain illegal acts.

The phrase "several witnesses" in the third full sentence on page six of the opinion is replaced by "Roger Conway." The sentence now reads:

This was contradicted by Roger Conway.

In all other respects the motion for rehearing is *DENIED*.

APPENDIX E – TEXT OF STATUTES INVOLVED

§ 371. Conspiracy to commit offense or to defraud United States

Credits
History; Ancillary Laws and Directives
Cross References
Research Guide
Interpretive Notes and Decisions
Go to chapter outline

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch 645, § 1, 62 Stat. 701.)
(As amended Sept. 13, 1994, P. L. 103-322. Title XXXIII, § 330016(1)(L), 108 Stat. 2147.)

§ 1344. Bank fraud

Credits
History; Ancillary Laws and Directives
Cross References
Research Guide
Interpretive Notes and Decisions
Go to chapter outline

Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Amendments:
1989. Act Aug. 9, 1989 substituted this section for one which read:

"(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice –

"(1) to defraud a federally chartered or insured financial institution; or

"(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

"(b) As used in this section, the term "federally chartered or insured financial institution" means –

"(1) a bank with deposits insured by the Federal Deposit Insurance Corporation;

"(2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;

"(3) a credit union with accounts insured by the National Credit Union Administration Board;

"(4) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or

"(5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States."

1990. Act Nov. 29, 1990, in the concluding matter, substituted "30" for "20".

§ 1956. Laundering of monetary instruments

Credits
History; Ancillary Laws and Directives
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(a) (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(A) (i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States

to or through a place outside the United States or to a place in the United States from or through a place outside the United States –

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent –

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law.

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of –

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section –

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money order, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means –

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31 [31 USCS §§ 5311 et seq.];

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving –

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) kidnapping, robbery, or extortion; or

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978 [12 USCS § 3101(7)]);

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or emplyee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), sections 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent

bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1708 (theft from the mail), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2319 (relating to copyright infringement), or section 2320 (relating to trafficking in counterfeit goods and services), of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act [21 USCS § 863] (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act [22 USCS § 2778(c)], section 11 (relating to violations) of the Export Administration Act of 1979 [50 USCS Appx. § 2410], section 206 (relating to penalties) of the International Emergency Economic Powers Act [50 USCS § 1705], section 16 (relating to offenses and punishment) of the Trading with the Enemy Act [50 USCS Appx. § 16], any felony violation of section 15 of the Food Stamp Act of 1977 [7 USCS § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) Environmental Crimes, a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42

U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency. (f) There is extraterritorial jurisdiction over the conduct prohibited by this section if –

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) **Notice of conviction of financial institutions.** If any financial institution or any officer, director, or

employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 3013. Special assessment on convicted persons

(a) The court shall assess on any person convicted of an offense against the United States –

(1) in the case of a misdemeanor –

(A) the amount of $25 if the defendant is an individual; and

(B) the amount of $100 if the defendant is a person other than an individual; and

(2) in the case of a felony –

(A) the amount of $50 if the defendant is an individual; and

(B) the amount of $200 if the defendant is a person other than an individual.

(b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

(Added Pub.L. 98-473, Title II, § 1405(a), Oct. 12, 1984, 98 Stat. 2174).

APPENDIX F – LINSCOMB'S LETTER BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 29, 1995

APPELLANT'S LETTER BRIEF

Re: No. 94-10594; *United States of America, Plaintiff/Appellee v. James Linscomb, Defendant/Appellant;* In the United States Court Of Appeals for the Fifth Circuit

On May 26, 1995, the Court issued an unpublished opinion in which it affirmed the conviction of Appellant James Linscomb in the above matter. Linscomb filed a motion for rehearing on June 8, 1995, and has yet to receive any ruling on that motion. The Court's mandate has yet to be issued.

Only eleven days after Linscomb's motion for rehearing was filed, the Supreme Court decided *United States v. Gaudin*, 63 U.S.L.W. 4611 (No 94-514, June 19, 1995). In *Gaudin*, the Supreme Court, upholding an *en banc* decision of the Ninth Circuit (reported at 28 F.3d 943) and overruling *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed.2d 692 (1929), ruled that in the trial of a criminal offense which required a showing of "materiality" (in that case, an alleged violation of 18 U.S.C.

§ 1001), it was constitutionally erroneous to withhold the issue of materiality from the jury and to treat that issue as a question of law. At the time of the *Gaudin* decision, every federal circuit that had considered that issue, with the sole exception of the Ninth Circuit, had reached the opposite conclusion. This Court like virtually all other federal appellate courts, has held that "materiality" is a question of law or a "mixed question" of law and fact, which is to be resolved by the District Court and not by the jury. *United States v. Williams*, 12 F.3d 452 (5th Cir. 1994) and cases cited therein.

In this case, Linscomb was charged with and convicted of a violation of 18 U.S.C. § 1014. This Court has previously held that "materiality" is an element of that offense which the Government must establish in order to obtain a conviction. *Williams*, supra. The Government concedes in this case, as it did in *Gaudin*, that materiality is an element of the offense in question.

Following Fifth Circuit practice in this regard, the District Court in Linscomb's case did not charge the jury on the element of materiality (see attached copy of the jury charge on 18 U.S.C. § 1014), but instead decided that issue as a question of law when Linscomb filed his post-verdict motions. Since the *Gaudin* decision now establishes that the jury must determine whether the Government has proven "materiality" in cases requiring such proof, Linscomb's conviction was constitutionally flawed. Indeed, the three elements of the offense upon which the jury was instructed and found by its verdict do not, viewed in the light of *Gaudin*, constitute a sufficient basis for convicting Linscomb of a violation of 18 U.S.C. § 1014.

Linscomb's counsel, like the District Court, relied upon case law holding that materiality was not an issue to be decided by the jury and did not object at trial to the failure to submit this element of the offense to the jury. Ordinarily, a defendant's failure to object would preclude review of an issue on appeal, but an exception to this rule exists where an intervening Supreme Court decision changes the law while the appeal is pending. *United States v. Novey*, 922 F.2d 624 (10th Cir.) cert. denied 501 U.S. 1234, 111 S.Ct. 2861, 115 L.Ed.2d 1028 (1991). When an intervening Supreme Court decision effects a change in the law relied upon by the District Court, the appellate court should apply the new rule enunciated by the Supreme Court to all cases pending before it on direct appeal. *United States v. Berkery*, 889 F.2d 1281 (3d Cir. 1989); *United States v. Pervez*, 871 F.2d 310 (3d Cir.) cert. denied 492 U.S. 925, 109 S.Ct. 3258, 106 L.Ed.2d 603 (1989); *United States v. Fitzgerald*, 545 F.2d 578 (7th Cir. 1976); see also *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379 n.15 (5th Cir. 1988).

Thus, even if there is sufficient evidence to convict Linscomb of a violation of 18 U.S.C. § 1014, the jury charge on deliberate ignorance was appropriate as to this charge, and the conviction on this charge was not multiplicitous (which Linscomb disputes), the conviction under § 1014 should be reversed under *Gaudin*.

Respectfully,

/s/ Charles M. Clark
Charles M. Clark

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon counsel of record for the United States on this the 29th day of June, 1995.

/s/ Charles M. Clark
Charles M. Clark

COUNT 3 – FALSE STATEMENTS – 18 U.S.C. § 1014

Title 18, United States Code, Section 1014, makes it a crime for anyone knowingly to make a false statement to federally insured savings and loan for the purpose of influencing the savings and loan on an application for a loan or advance.

For you to find Linscomb guilty of this crime as charged in count 3, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Bedford Savings Association was federally insured;

Second: That the defendant made a false statement to Bedford Savings Association knowing it was false; *and*

Third: That the defendant did so for the purpose of convincing Bedford Savings Association to give the defendant a loan or advance.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What

must be proven is that the defendant intended to influence the bank by the false statement. To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party knowing that the third party will submit the false statement to the federally insured bank.

A false statement can include the failure to disclose material information needed to avoid deception in connection with a loan transaction.

APPENDIX G – APPELLEE'S [GOVERNMENT'S] RESPONSE TO APPELLANT [LINSCOMB'S] LETTER BRIEF

[SEAL]

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

July 21, 1995

APPELLEE'S RESPONSE TO
APPELLANT'S LETTER BRIEF

Re: No. 94-10594; *United States of America, Plaintiff/Appellee v. James Linscomb, Defendant/Appellant;* In the United States Court Of Appeals for the Fifth Circuit

On May 26, 1995, the Court issued an unpublished opinion in which it affirmed the conviction of Appellant James Linscomb in the above matter. Linscomb filed a motion for rehearing on June 8, 1995, thereby delaying the issuance of the mandate. To date, the Court has yet to rule on the motion for rehearing.

On June 29, 1995, Linscomb filed a letter brief seeking to have his conviction for one count of submitting a false statement in violation of 18 U.S.C. § 1014 reversed in light of the recent Supreme Court decision, in *United States v. Gaudin*, 63 U.S.L.W. 4611 (No. 94-514, June 19, 1995). Linscomb's motion is without merit and should be denied.

In *Gaudin*, respondent was charged by federal indictment with, among other things, multiple counts of making false statements on federal loan documents in

violation of 18 U.S.C. § 1001 for his involvement in a number of real estate transactions. *Id.* At the close of the evidence, the trial judge instructed the jury that:

> to convict respondent, the Government was required to prove, *inter alia*, that the alleged false statements were material to the activities and decisions of HUD. But, the court further instructed, "[t]he issue of materiality . . . is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements. *Id.* at 4611-12.

Respondent was convicted of the false statement charges. The Supreme Court upheld the Ninth Circuit's reversal of these convictions[1] wherein it ruled that in a trial of a criminal offense which by statute required a showing of "materiality" (in that case, an alleged violation of 18 U.S.C. § 1001), it was constitutionally erroneous to withhold the issue of materiality from the jury and to treat that issue as a question of law. *Id.*

In the instant case, Linscomb was convicted of one count submitting a false statement to Bedford Savings Association in violation of 18 U.S.C. § 1014. Section 1014 of Title 18 provides:

> "Whoever knowingly makes any false statement or report, . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Insurance Corporation . . . " (1988 ed.)

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[1] *United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993)

There are three statutory elements to a violation of 18 U.S.C. § 1014, false statements. The government must prove that appellant Linscomb (1) knowingly, (2) made a false statement or report, (3) for the purpose of influencing in any way the action of a federally insured financial institution upon any application, advance, commitment, or loan. *United States v. Williams,* 458 U.S. 279 (1982); *United States v. Bowman,* 783 F.2d 1192 (5th Cir. 1986). The Fifth Circuit has implied a fourth element, requiring that the statements must be false as to a material fact. *United States v. Thompson,* 811 F.2d 841 (5th Cir. 1987).

In conformity with the statute and without defense objection, the District Court Judge instructed the jury on the false statement count as follows:

> Count 3. False statements. 18 USC, section 1014. Title 18, United States Code, Section 1014 makes it a crime for anyone knowingly to make a false statement to federally insured savings and loan for the purpose of influencing the savings and loan on an application for a loan or advance. Here again, for you to find Linscomb guilty of this crime as has proved each of the following – these are our elements, again, of this offense – beyond a reasonable doubt:
>
> And the first element is that the Bedford Savings Association was federally insured. The second element is that the defendant made a false statement to Bedford Savings Association knowing it was false. And the third element is that the defendant did so for the purpose of convincing Bedford Savings Association to give defendant a loan or advance.

> It's not necessary, however, to prove that the institution involved was, in fact, influenced or misled. What must be proven is that the defendant intended to influence the bank by the false statement. To make a false statement to a federally insured bank, the defendant need not directly submit the false statement to the institution. It is sufficient if the defendant submits the statement to a third party, knowing that the third party will submit the false statement to the federally insured bank. A false statement can include the failure to disclose material information needed to avoid deception in connection with a loan transaction. (7 R. 101-102).

The District Court Judge did not instruct the jury on the last part of the pattern jury instruction which provided:

> If you find that the government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide. (U.S. Fifth Circuit Judges Association, Pattern Jury Instructions (Criminal Cases) (1990 ed.), p. 131).

The jury was therefore afforded the opportunity to decide the issue of whether the settlement statement had a tendency to influence or was capable of influencing Bedford Savings Association. Indeed, both the government and Linscomb argued the issue of materiality during closing argument. The government argued that the use of the second settlement statement deceived both Ray Tanner and David Jones of Bedford Savings Association

as to the true use of the loan proceeds. (7 R. 31). Linscomb argued that "the settlement statement wasn't even a requested document for the closing." (7 R. 31).

Because the District Court did not specifically withhold the issue of materiality from the jury, Linscomb's only argument is that the false statement instruction for materiality was insufficient. However, Linscomb failed to object to that instruction. Therefore, the Standard of review in the absence of an objection is "under the demanding plain error standard, inquiring whether this error seriously affected (appellant's) substantial rights." *United States v. Baytank*, 934 F.2d 599, 606 (5th Cir. 1991); *see United States v. Gaudin*, 63 U.S.L.W. 4611 (No. 94-514, June 19, 1995) (Rehnquist, C.J., concurring). Even under the less daunting harmless error analysis, *Id.*, Linscomb's argument must fail.

Because materiality is a judge-made limitation and not an element of the statute, there can be no error for failing to submit the issue to the jury. Nevertheless, the issue of materiality was in fact submitted to the jury. The Court in *Gaudin* defined materiality as, "the statement must have a 'natural tendency to influence, or [be] capable of influencing the decision of the decision making body to which is [sic] was addressed". *Id.* at 4612 (citations omitted). As noted above, the jury was instructed that in order to convict Linscomb, it had to find that he submitted a false statement intending to influence Bedford Savings Association.

Lastly, even if the District Court Judge incorrectly instructed the jury on the false statement count, the remedy is to vacate only the conviction for the false statement. *See United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993).

For the foregoing reasons, Linscomb's motion should be denied.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing letter brief for the United States was served on counsel for appellant this 21 day of July, 1995, by depositing it in first class mail:

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APPENDIX H – EXCERPTS FROM LINSCOMB'S BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 94-10594

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

JAMES LINSCOMB,

Defendant/Appellant.

APPELLANT'S BRIEF

[CORRECTED]

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* * *

STATEMENT OF THE ISSUES

1. Did the prosecution, by the evidence it adduced and arguments it made at trial, constructively amend the indictment or create a variance between the indictment's factual allegations and the theory of the case pursued at trial?

2. Was the evidence sufficient to warrant a jury verdict of guilty on all the counts upon which the jury convicted Appellant James Linscomb?

3. Did the District Court err in giving the jury a "deliberate ignorance" instruction?

4. Did the prosecution establish that Linscomb made a materially false statement?

5. Was Linscomb's conviction of both bank fraud and making a false statement multiplicitous?

* * *

IV. THE STATEMENT LINSCOMB WAS ACCUSED OF MAKING WAS NOT MATERIALLY FALSE

One essential element of a claim under 18 U.S.C. § 1014 is that the statement in question must be false. 18 U.S.C. § 1014. It must also be materially false. Statutes imposing criminal penalties for making false statements long have required materiality as an essential element. Section 1014 is no exception: the government must prove that the false statement mattered. ***United States v. Williams,*** 12 F.3d 452 (5th Cir. 1994) The severe penalties flowing from a conviction for making a false statement require the government to "make a reasonable showing

of the potential effects of the statement". ***United States v. Beer,*** 518 F.2d 168, 172 (5th Cir. 1975). Section 1014 was not designed to convict on a technicality.

A statement is materially false only if it is shown to be capable of influencing a decision of the institution to which it was made. ***United States v. Williams,*** *supra.* This determination is one of law, to be made *de novo* by the Court. ***Id.*** To determine whether such a showing has been made, the statements must be analyzed in the particular context in which they were made. ***Id.*** In the context of Linscomb's case, the inquiry is whether the disbursement statement at issue was "capable of influencing the bank's decision to loan the [borrower] money it would not otherwise loan had it known the truth." ***Id.***[60]

At trial, the prosecution attempted to supply the element of materiality with the bald argument that the statement regarding the payoff of a second lien to Foxhall could somehow tend to deceive Bedford into believing

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[60] In addressing the materiality argument, the District Court wrote as follows:

"Here, the evidence showed that Bedford's approval of the loan was based on misrepresentations and omissions regarding the purpose of the loan. The settlement forms, which could have set the record straight as to the purpose of the loan, and also could have provided a basis for the bank to recall or change the conditions on the loan, again concealed and misrepresented the purpose of more than one-quarter of the loan."

(Rex. Exc. "D"; Rec. p. 594). This observation does not withstand scrutiny. First, Linscomb challenges the government to cite to this Court evidence of a single misrepresentation which Bedford's loan committee was relying upon when it approved this loan on April 28, 1988. There is no such evidence.

that all of the proceeds of the loan were going toward the cost of acquisition of the property. When it failed to prove that Linscomb made or adopted the statement it accused him of, (the "payoff second lien"statement), the Government then argued that the statement Linscomb actually did make but which was never sent to Bedford (the statement that the excess proceeds were disbursed to Foxhall) was misleading. The District Court indicated that the conviction could be predicated upon either of these theories. Both theories are untenable. Every version of the settlement statement that was prepared by Sabine Title truthfully showed that the price being paid to Texas Commerce Bank for its interest in the property was $1,300,000. Cf. ***United States v. Tullos,*** 868 F.2d 689 (5th Cir. 1989) (borrowers prepared closing statements overstating the actual purchase price of the property to conceal unauthorized disbursements contrary to prior loan agreements). In this case, the settlement statements accurately reflected the purchase price and the fact that loan proceeds were utilized for purposes other than acquiring the interest for which the lender bargained. Every draft of the disbursement sheet that was ever prepared – the initial one showing a disbursement to Dizbo, the second draft showing a disbursement to Foxhall, and even the final draft (for which Linscomb is not responsible) showing a disbursement to Foxhall to pay off a second lien – essentially showed the same thing to Bedford: every one showed that the excess funds were being paid to a third party, rather than Texas Commerce, and were being utilized for purposes ***other than payment of the sum to Texas Commerce Bank that was necessary for Bedford Savings to attain its first lien position in the property.***

The statement *in all material respects* was non-misleading, because it disclosed the very fact Bedford claimed should have been disclosed to it. If in fact Bedford Savings had any objection to funds being used for purposes other than securing the collateral for the loan, then the very statement that the prosecution complained about showed Bedford all it needed to make its objections known.[61]

V. THE FALSE STATEMENT CONVICTION IS MULTIPLICITOUS

Even if it should not be set aside for any of the foregoing reasons, the false statement conviction should be set aside as multiplicitous. The indictment alleged that the submission of the false settlement statement was part and parcel of the bank fraud scheme. In this situation, the false statement charge was but a component of the much

---

[61] If in fact it was objectionable to Bedford Savings for the borrower to walk away from the closing with loan funds (as the prosecutors repeatedly suggested at trial), then it was equally objectionable for loan funds to be utilized to pay off a second lien which, by definition, would be junior to and inferior to the first lien held by Texas Commerce Bank. The government's own witness – a member of Bedford's loan committee – acknowledged that a junior lienholder need not have been "paid off" for Bedford to obtain the security it bargained for on the loan. (Rec. Vol. 5, p. 239) A "payoff" of the second lienholder would have been just as much an unnecessary diversion of funds as a payment to a complete stranger to the transaction. The injury (if any) to the lender is identical in either circumstance. Thus, only by banking upon ignorance of the law could the prosecution hope to persuade anyone that the addition of the notation "payoff second lien" was material.

broader bank fraud charge, and was subsumed within the latter. A conviction on both charges is not permissible. ***United States v. Seda,*** 978 F.2d 779 (2d Cir. 1992). The District Court erred in entering convictions on both of these counts.

* * *

APPENDIX I – EXCERPTS FROM TRIAL COURT'S JURY CHARGE

EXCERPTS FROM TRIAL COURT'S
****jury charge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	4:93-CR-49-E
JAMES LINSCOMB (2)	§	

JURY CHARGE

(Filed Mar. 18, 1994)

Members of the Jury:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about the burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law

about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

* * *

COUNT 2 – BANK FRAUD – 18 U.S.C. § 1344

Linscomb is charged in count 2 of the indictment with bank fraud in violation of Title 18, United States Code, § 1344. Title 18, United States Code, § 1344 provides in pertinent part as follows:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a federally . . . insured financial institution; or
>
> (2) to obtain any of the moneys . . . or other property owned by or under the custody or control of a federally . . . insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be [guilty of an offense against the United States.]

For you to find the defendant guilty of the charge of bank fraud, the government must prove each of the following elements beyond a reasonable doubt:

> *First:* that Bedford Savings Association was federally insured;
>
> *Second,* that the defendant knowingly devised a scheme or artifice to (1) defraud Bedford Savings Association or (2) to obtain assets, money or property from Bedford Savings Association by means of false or fraudulent pretenses, representations or promises as alleged in the indictment; *and*

Third, that the defendant in fact executed, or attempted to execute, the scheme or artifice to defraud Bedford Savings Association or caused its execution, as alleged in the indictment.

The words "scheme" and "artifice" include any plan or course of action intended to deceive others, and to obtain by some false or fraudulent device or representation, money or property from the persons or entities that are deceived.

A statement or representation may be "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifferences as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact.

To act with "intent to defraud" means to act knowingly and with the intent to deceive or cheat, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

It is not necessary that the government prove that the defendant devised *both* a scheme or artifice to defraud Bedford Savings Association *and* a scheme or artifice to obtain money or property by means of false or fraudulent pretenses. It would be sufficient if the government has proved, beyond a reasonable doubt, either type of scheme or artifice, but in that event, in order to return a verdict of guilty, you must unanimously agree on which scheme or artifice the defendant devised. If you cannot agree in that manner, you must find that defendant not guilty.

It is not necessary that the government prove all the details alleged in the indictment concerning the precise nature and purpose of the scheme or that the alleged scheme actually succeeded in defrauding anyone or that the defendant obtained a benefit.

What must be proved beyond a reasonable doubt is the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same scheme alleged in the indictment.

Although it is not necessary for the government to prove an actual loss of funds by Bedford Savings Association, the government must prove beyond a reasonable doubt that the alleged scheme or artifice placed Bedford Savings Association at a risk of loss and that Bedford Savings Association did not knowingly accept such a risk.

In your consideration of Count 2, a defendant may be found guilty of a violation of Section 1344 if you find beyond a reasonable doubt James Linscomb committed the offense himself, or if you find beyond a reasonable doubt that he aided or caused the commission of the offense by another.

* * *

COUNTS 5-7 – MONEY LAUNDERING – 18 U.S.C. § 1956(a)(1)(B)(i)

Title 18, United States Code, Section 1956(a)(1)(B)(i) provides in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct a financial

transaction which in fact involves the proceeds of specified unlawful activity –

(B) knowing that the transaction is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity shall be guilty of an offense against the United States.

For you to find James Linscomb guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

First: That James Linscomb knowingly conducted, attempted to conduct, or caused to be conducted a financial transaction;

Second: That James Linscomb knew that the property involved in the transaction represented the proceeds of some form of unlawful activity;

Third: That the property involved in the transaction did, in fact, represent proceeds of at least one specified unlawful activity; and

Fourth: That James Linscomb engaged in the transaction knowing that the transaction was designed, in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity.

The term "conduct" includes initiating, concluding, or participating in the initiation of, or conclusion of, a transaction.

The term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of property. With respect to a financial institution, the term "transaction" includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer or delivery by, through, or to a financial institution, by whatever means affected.

The term "financial transaction" means a transaction involving the movement of funds by wire or other means; or a transaction involving one or more monetary instruments which in any way or degree affects interstate commerce; or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate commerce in any way or degree.

"Interstate commerce" means commerce or travel between one state, territory, or possession of the United States and another state, territory, or possession of the United States. It is not necessary for the government to show that James Linscomb actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequences of the acts James Linscomb took would be to affect interstate commerce in any way or degree or that the transaction in which James Linscomb engaged involved a financial institution whose activities affect interstate commerce in any way or degree. If you decide that there would be any effect in any way or degree on interstate commerce, or that the transaction involved a financial institution whose activities affect interstate commerce in any way or

degree, then that is enough to satisfy this element. The use of a FDIC insured financial institution to conduct financial transactions affects interstate commerce.

The term "financial institution," as used above, includes federally insured banks and savings and loans. The term "monetary instrument" means coin or currency of the United States or any other country, travelers' checks, personal checks, bank checks, and money orders.

The phrase, "knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity," as used in the second element, means that James Linscomb knew that the property involved in the transaction represented the proceeds of some form, though not necessarily which form, of fraud that constitutes a felony under state or federal law.

The term "specified unlawful activity" means any act or activity constituting an offense under Title 18, United States Code, Section 1344 (Bank Fraud). You were instructed on this offense earlier, and it is a felony under the laws of the United States.

In addition, the law requires that James Linscomb conducted, or attempted to conduct, a financial transaction involving the proceeds of at least one specified unlawful activity as defined earlier, knowing that the transaction was designed in whole or in part, to conceal or disguise the nature, location, source, ownership, or control of the proceeds of at least one specified activity.

* * *

APPENDIX J – INDICTMENT FILED IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NO.
V.	*	493CR-049-E
	*	
MARSHALL WILLEY (1)	*	VIOLATIONS:
JAMES LINSCOMB (2)	*	18 U.S.C. § 371
	*	18 U.S.C. § 1344
	*	18 U.S.C. § 1014
	*	18 U.S.C. § 215
	*	18 U.S.C. § 1956

INDICTMENT

(Filed April 22, 1993)

The Grand Jury charges:

COUNT 1

(Conspiracy 18 U.S.C. § 371)

INTRODUCTION

AT ALL TIMES MATERIAL TO THIS INDICTMENT:

1. The Federal Savings and Loan Insurance Corporation (FSLIC) was an agency of the United States established to protect depositors by insuring deposits in savings and loan institutions in amounts up to $100,000.00 per account.

2. Bedford Savings Association, located in Bedford, Texas, was a financial institution the accounts of which were insured by the FSLIC.

3. Defendant JAMES LINSCOMB was an owner and officer of Woodridge Land Co., Texla Land Corporation, MWI-Land, Inc., O.D., Inc., and Dizbo, Inc.

4. Defendant MARSHALL WILLEY was an owner and officer of MWI-Land, Inc., Texla Land Corporation, and O.D., Inc.

5. Bill Wilder was the Chairman of the Board and majority shareholder of Bedford Savings Association.

6. MWI-Land, Inc., Texla Land Corporation, Woodridge Land Co., Foxhall, Inc., O.D., Inc., and Dizbo, Inc. were corporations incorporated in the state of Texas.

7. The "TEXLA PROPERTY" and the "DIZBO PROPERTY" were the same and consisted of various tracts of land located in Orange County, Texas.

8. The "DIZBO LOAN" was a $1,900,000.00 loan from Bedford Savings Association to Dizbo, Inc. for the purchase of the Dizbo Property.

9. Sabine Title Company was an escrow company used by the Defendants to close the Dizbo Loan.

10. Walker County Title was an escrow company that was used by the Defendants to transfer money to Bill Wilder.

THE CONSPIRACY

11. Beginning in or about January of 1988, and continuing until in or about December, 1988, in the Northern District of Texas, and elsewhere, Defendants

MARSHALL WILLEY

and

JAMES LINSCOMB

knowingly and willfully combined, conspired, confederated, and agreed with others both known and unknown to the Grand Jury, to commit certain offenses against the United States, to wit:

(1) to knowingly execute and attempt to execute a scheme and artifice to defraud Bedford Savings Association and to obtain moneys and funds of Bedford Savings Association by means of false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section 1344;

(2) to knowingly make a false statement and report for the purpose of influencing the actions of Bedford Savings Association on a loan transaction, in violation of Title 18, United States Code, Section 1014;

(3) to corruptly give, offer, and promise a thing of value in excess of $100 to any person with the intent to influence and reward an officer, director, employee, agent and attorney of Bedford Savings Association, in violation of Title 18, United States Code, Section 215(a)(1);

(4) to knowingly and willfully conduct and attempt to conduct a financial transaction involving the proceeds of specified unlawful

activities, to wit: bank fraud in violation of Title 18, United States Code, Section 1344, knowing that the transactions involved the proceeds of some form of unlawful activity, knowing the financial transactions were designed in whole and in part to conceal and disguise the nature, source, location, ownership and control of the proceeds of said specified unlawful activities, in violation of Title 18 United States Code, Section 1956.

12. It was a part of the conspiracy and the scheme and artifice for the Defendants to obtain a loan from Bedford Saving Association by paying a bribe to Bill Wilder and by submitting false and fraudulent documents designed to deceive Bedford Savings Association in order to obtain funds for personal uses.

13. It was further part of the conspiracy and the scheme and artifice that JAMES LINSCOMB, through Dizbo, Inc., would apply for a loan in the amount of $1,900,000.00 from Bedford Savings Association for the stated purpose of purchasing the Dizbo Property from Texas Commerce Bank-Beaumont.

14. It was a further part of the conspiracy and scheme and artifice that JAMES LINSCOMB would submit a settlement statement to Bedford Savings Association for the Dizbo Loan which stated that $564,881.84 of the loan proceeds was to pay off a second lien with Foxhall, Inc, when in fact, MARSHALL WILLEY and JAMES LINSCOMB would obtain the $564,881.84 for their own benefit and pay $100,000.00 to Bill Wilder.

OVERT ACTS

15. In furtherance of the conspiracy and in order to effect its objects, MARSHALL WILLEY, JAMES LINSCOMB and others both known and unknown to the grand jury committed the following overt acts within the Northern District of Texas and elsewhere:

a) Between January of 1988 and May of 1988, MARSHALL WILLEY agreed to pay Bill Wilder money in exchange for a loan from Bedford Savings Association to JAMES LINSCOMB and Dizbo, Inc. for the purchase of the Dizbo Property.

b) On May 3, 1988, JAMES LINSCOMB and Dizbo, Inc., borrowed $1,900,000.00 from Bedford Savings Association for the purpose of purchasing the Dizbo Property.

c) On May 3, 1988, Sabine Title prepared a settlement statement for the purchase of the Dizbo Property by JAMES LINSCOMB and Dizbo from Texas Commerce Bank-Beaumont for a gross loan amount of $1,900,000.00 reflecting cash to Dizbo of $564,881.84.

d) On May 3, 1988, Sabine Title Company, at the direction of JAMES LINSCOMB, prepared a second settlement statement which reflected a loan in the amount of $1,900,000.00 for the purchase of the Dizbo Property with $564,881.84 reflected as paying off a second lien to Foxhall, Inc.

e) On May 3, 1988, JAMES LINSCOMB submitted a settlement statement to Bedford Savings Association representing that $564,881.84 of the loan proceeds was used to pay off a second lien with Foxhall, Inc.

f) On May 4, 1988, Sabine Title Company issued a check in the amount of $564,881.84 payable to Foxhall, Inc. and gave it to JAMES LINSCOMB.

g) On May 4, 1988, JAMES LINSCOMB exchanged the $564,881.84 Sabine Title Company check payable to Foxhall, Inc. for a cashier's check in the amount of $564,881.84 at First City National Bank.

h) On May 5, 1988, Foxhall, Inc. exchanged the cashier's check in the amount of $564,881.84 for a cashier's check in the amount of $364,881.84 payable to Foxhall, Inc. drawn on First City National Bank and transferred the remaining $200,000.00 to Huntsville National Bank in care of Walker County Title Company escrow account.

i) On May 5, 1988, MARSHALL WILLEY caused Walker County Title Company to transfer $100,000.00 to Citizens National Bank for Rusk County Abstract and Bill Wilder in connection with the $1,900,000.00 loan to Dizbo, Inc.

j) On May 6, 1988, Foxhall, Inc., on behalf of JAMES LINSCOMB, paid approximately $100,000.00 to MARSHALL WILLEY.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

(Bank Fraud 18 U.S.C. § 1344)

1. Paragraphs one through ten and twelve through fourteen of Count 1 are hereby realleged and fully incorporated herein.

2. Between on or about January, 1988, and on or about May 5, 1988, within the Northern District of Texas, Defendants MARSHALL WILLEY and JAMES LINSCOMB devised a scheme and artifice, as described in paragraphs twelve through fourteen of Count 1 (1) to defraud Bedford Savings Association, an institution the accounts of which were insured by the FSLIC, and (2) to obtain moneys and funds owned by and under the custody and control of Bedford Savings Association by means of false and fraudulent pretenses, representations and promises.

3. On or about May 5, 1988, within the Northern District of Texas, Defendants MARSHALL WILLEY and JAMES LINSCOMB knowingly executed and attempted to execute the aforesaid scheme and artifice by causing Bedford Savings Association to fund the Dizbo Loan.

All in violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 3

(False Statements 18 U.S.C. § 1014)

1. Paragraphs one through ten and twelve through fourteen of Count 1 are hereby realleged and fully incorporated herein.

2. On or about May 3, 1988, within the Northern District of Texas, Defendants MARSHALL WILLEY and JAMES LINSCOMB did knowingly make a false and material statement to Bedford Saving Association for the purpose of influencing the actions of Bedford Savings

Association on a loan, in that JAMES LINSCOMB submitted a settlement statement dated May 3, 1988, in connection with the Dizbo Loan, representing to Bedford Savings Association that $564,881.84 of the loan proceeds was used to pay off a second lien to Foxhall, Inc., when in truth and in fact, as MARSHALL WILLEY and JAMES LINSCOMB then well knew, there was no second lien and the $564,881.84 was for their own benefit and to pay $100,000.00 to Bill Wilder.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT 4

(Bank Bribery 18 U.S.C. § 215(a)(1))

1. Paragraphs one through ten and twelve through fourteen of Count 1 are hereby realleged and fully incorporated herein.

2. On or about May 5, 1988, within the Northern District of Texas, Defendant MARSHALL WILLEY and JAMES LINSCOMB corruptly gave approximately $100,000.00 to Bill Wilder, an officer of Bedford Savings Association, with the intent to influence and reward him in connection with a $1,900,000.00 loan to Dizbo, Inc. from Bedford Savings Association.

All in violation of Title 18, United States Code, Sections 215(a)(1) and 2.

COUNTS 5-7

(Money Laundering 18 U.S.C. § 1956)

1. Paragraphs one through ten and twelve through fourteen of Count 1 are hereby realleged and fully incorporated herein.

2. On the dates listed below as to each count, within the Northern District of Texas and elsewhere, Defendants MARSHALL WILLEY and JAMES LINSCOMB did knowingly and willfully conduct and attempt to conduct the following financial transactions affecting interstate and foreign commerce, which involved the proceeds of specified unlawful activity, to wit, bank fraud, in violation of Title 18, United States Code, Section 1344, knowing that the funds used represented the proceeds of some form of unlawful activity and knowing that the financial transaction was designed in whole and in part to conceal and disguise the nature, source, location, ownership, and control of the proceeds of said specified unlawful activity:

COUNT	DATE	AMOUNT	TRANSACTION
5	May 4, 1988	$564,881.84	purchase of First City National Bank cashier's check
6	May 5, 1988	$364,881.84	purchase of First City National Bank cashier's check
7	May 5, 1988	$200,000.00	wire transfer from First City National Bank to Walker County Title escrow account at Huntsville National Bank

Each in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

A TRUE BILL

/s/ Illegible
FOREMAN

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Supreme Court, U.S.
FILED
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No. 95-746

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES LINSCOMB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court committed plain error in not instructing the jury that, to convict petitioner of violating 18 U.S.C. 1014, it was required to determine that petitioner's false representation to a bank had been material.

2. Whether the Double Jeopardy Clause was violated by petitioner's conviction, in a single prosecution, of committing bank fraud, in violation of 18 U.S.C. 1344, and of making a false representation to a bank, in violation of 18 U.S.C. 1014.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-746

JAMES LINSCOMB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unpublished, but the decision is noted at 56 F.3d 1386 (Table). The order of the district court denying petitioner's post-trial motions (Pet. App. 11a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1995. The court of appeals entered an order on August 11, 1995, modifying the opinion but otherwise denying rehearing. Pet. App. 31a-32a. The petition for a writ of certiorari was filed on November 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count each of conspiracy, in violation of 18 U.S.C. 371, bank fraud, in violation of 18 U.S.C. 1344, and submitting a false statement to a federally insured financial institution, in violation of 18 U.S.C. 1014; and on three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to a total of 46 months' imprisonment, to be followed by three years' supervised release. He was also fined $15,000 and ordered to pay restitution in the amount of $350,000. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-10a.

1. In 1981, a corporation operated by petitioner purchased certain land in Texas (the Dizbo property) for development. In 1987, the bank holding the mortgage on the Dizbo property, Texas Commerce Bank, foreclosed and purchased the land, but petitioner later arranged to repurchase the property from that bank for $1.3 million. Petitioner asked Marshall Willey to help him obtain a loan that would cover both the actual purchase price of the Dizbo property and additional funds for petitioner's own use. Pet. App. 15a.

Willey went to a friend, Bill Wilder, who was president of Bedford Savings Association (Bedford Savings). Willey agreed to give Wilder $100,000 if Bedford Savings made a $1.9 million loan to petitioner. The Bedford Savings loan committee was not informed that the amount of the loan exceeded the purchase price of the land. Pet. App. 15a-16a.

The initial loan settlement papers prepared by the title company showed that the difference of just under

$600,000 between the purchase price and the amount of the loan was to be remitted to petitioner. Wilder advised Willey that the loan could not close with the additional proceeds going to the borrower. On Willey's advice, petitioner directed the title company to change the papers and to create a second settlement statement indicating that the excess funds would go to another corporation, Foxhall, Inc., purportedly to pay off a second lien on the property. In fact, there was no such second lien, and petitioner had signatory authority on Foxhall's checking account. The Bedford Savings records contained a promissory note to Foxhall signed by petitioner for $600,000, apparently intended to support the false representation that Foxhall had a second lien on the property. Pet. App. 16a-17a; Gov't C.A. Br. 4-5 & n.4.

Petitioner directed the disposition of the approximately $600,000 in excess funds received from Bedford Savings. Petitioner sent $200,000 to Willey, who, in turn, gave $100,000 to Wilder for his aid in securing the loan. Petitioner transferred the remainder of the excess funds, approximately $364,000, out of a Foxhall account to purchase certificates of deposit at another bank. Pet. App. 17a; Gov't C.A. Br. 5-6.

2. Petitioner's conviction for violating 18 U.S.C. 1014 was based on his false representation to Bedford Savings that approximately $564,000 of the loan would be used to pay off a second lien on the Dizbo property. Pet. App. 76a-77a.[1] The court instructed the jury

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[1] Petitioner's bank fraud conviction is discussed at page 4, *infra*. Petitioner's money laundering convictions were based upon later financial transactions in which he engaged with the excess funds. Petitioner's conspiracy conviction was based upon his conspiracy to commit bank fraud and money laundering, to make false statements to the bank, and to commit

that to convict petitioner of that offense, the government was required to establish (1) that Bedford Savings was federally insured; (2) that petitioner made a false statement to Bedford Savings knowing the statement was false; and (3) that petitioner made the false statement for the purpose of convincing Bedford Savings to give him a loan. The court did not instruct the jury that the materiality of the false statement was an additional element of the offense. Petitioner did not object to those instructions at trial. *Id.* at 52a-53a.

3. On May 26, 1995, the court of appeals affirmed petitioner's convictions. Pet. App. 1a-10a. It held that the evidence on all counts was sufficient, and rejected petitioner's claim that his false representation that Foxhall had a lien on the Dizbo property was not materially false. *Id.* at 7a (holding that petitioner's false statement was "clearly material"). The court of appeals also held that petitioner's convictions for bank fraud (18 U.S.C. 1344) and for making a false statement to the bank (18 U.S.C. 1014) were not multiplicitous, because petitioner's "submission of false statements was not the sole basis for the bank fraud count." Pet. App. 10a. Rather, the court noted, the bank fraud conviction was based upon a broader "course of fraudulent conduct that was intended to secure the loan." *Ibid.*

On June 19, 1995, while petitioner's petition for rehearing was pending in the court of appeals, this

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bank bribery (18 U.S.C. 215(a)(1)). Pet. App. 70a-79a. Petitioner was acquitted on Count 4, which alleged a substantive count of bank bribery involving the $100,000 payment from Willey to Wilder in connection with the Dizbo property loan. Gov't C.A. Br. 2 n.1.

Court ruled in *United States* v. *Gaudin*, 115 S. Ct. 2310, that where the materiality of a false statement is an element of an offense, the statement's materiality is to be determined by the jury, not by the court. Following the decision in *Gaudin*, petitioner filed an additional letter brief with the court of appeals raising for the first time a claim that the trial judge had erred in not requiring the jury to determine whether the false statement to Bedford Savings alleged to violate 18 U.S.C. 1014 was material. Pet. App. 45a-48a. The government argued in response that materiality is not an element of an offense under 18 U.S.C. 1014, and that, in any event, there was no plain error. Pet. App. 50a-55a. The court of appeals thereafter issued an order clarifying two factual statements in its initial opinion but otherwise denying rehearing. *Id.* at 31a-32a. The court of appeals did not address the merits of the *Gaudin* claim belatedly raised by petitioner. *Ibid.*

DISCUSSION

1. Petitioner argues that materiality is an element of the offense described by 18 U.S.C. 1014 and that his conviction must be reversed because the district court did not instruct the jury that it must find that his false statement was material in order to convict. That contention lacks merit.

In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), this Court held that, where the materiality of a false statement is an element of an offense, the statement's materiality is to be determined by the jury, not by the court.[2] Materiality of the alleged false statement,

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[2] To be material, a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the

however, is not an element of Section 1014. Section 1014 authorizes the conviction of whoever "knowingly makes any false statement," where that statement is made "for the purpose of influencing in any way the action" of covered financial institutions (including the federally insured bank involved here) on loans or other specified transactions. The language of Section 1014 does not require that the false statement also be material.

Because Congress defines the elements of an offense through the language of the statute, Section 1014 does not support the conclusion that materiality is an element of that offense. See *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive."). Indeed, this Court reached a similar conclusion in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938), in construing a statute that was a direct predecessor of Section 1014 and that contained identical pertinent language.[3]

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decisionmaking body to which it was addressed." *Gaudin*, 115 S. Ct. at 2313.

[3] *Kay* involved a prosecution under former 12 U.S.C. 1467(a) (1946) (repealed 1948), which provided for punishment of "[w]hoever makes any statement, knowing it to be false, * * * for the purpose of influencing in any way the action of the Home Owners' Loan Corporation * * * upon any * * * loan." See 303 U.S. at 3 n.1.

The courts of appeals are divided on whether materiality is an element of Section 1014. In *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977), cert. denied, 435 U.S. 915 (1978), the court held that materiality is not an element of Section 1014. The other courts of appeals, however, including the court below, have listed materiality as an element of Section 1014.[4] Because of that conflict, which has taken on increased significance now that materiality is a jury issue, we have filed a petition for a writ of certiorari presenting that issue in *United States* v. *Wells*, 63 F.3d 745 (8th Cir. 1995), petition for cert. pending, No. 95-1228 (filed Jan. 31, 1996).[5]

This case, however, does not supply an appropriate vehicle to resolve that question. Because petitioner failed to object to the district court's decision not to send the issue of materiality to the jury, the sole question presented would be whether that decision

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[4] See, *e.g.*, *United States* v. *Nash*, 64 F.3d 504 (9th Cir. 1995); *United States* v. *Wells*, 63 F.3d 745 (8th Cir. 1995), petition for cert. pending, No. 95-1228 (filed Jan. 31, 1996); *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *United States* v. *Concemi*, 957 F.2d 942, 951 (1st Cir. 1992); *United States* v. *Haddock*, 956 F.2d 1534, 1549 (10th Cir.), cert. denied, 506 U.S. 828 (1992); *United States* v. *Rapp*, 871 F.2d 957, 964 (11th Cir.), cert. denied, 493 U.S. 890 (1989); *Theron* v. *United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982). But see *United States* v. *Cleary*, 565 F.2d at 46.

[5] We have provided a copy of our petition in *Wells* to petitioner.

was plain error in light of the particular facts of this case. See *United States* v. *Olano*, 113 S. Ct. 1770, 1775-1779 (1993) (appellate court may consider claims of error not raised below only if error is "clear" and "obvious" under current law, and will not reverse unless the error affected substantial rights and unless failure to reverse would result in a miscarriage of justice that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings").

Moreover, petitioner fails to establish plain error. First, any error in the decision not to submit the issue of materiality to the jury in this case was not "clear" or "obvious" under then-current law.[6] Nor was petitioner prejudiced by such error, because the false representation that he made to Bedford Savings regarding Foxhall's entitlement to the loan proceeds was patently material to its loan decisions, as both the district court (Pet. App. 20a-21a) and the court of appeals (*id.* at 6a-7a) found. Moreover, to convict, the jury necessarily concluded that petitioner made the false statement for the specific purpose of influencing the action of Bedford Savings on the loan.[7] It is

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[6] On the contrary, at the time of trial and even at the time of the court of appeals' decision (issued about one month before this Court's decision in *Gaudin*), it was neither clear nor obvious that if materiality was an element of a false statement offense it should be decided by the jury. Rather, the weight of authority was that the materiality determination in false statement cases was a question for the court. See, *e.g.*, *United States* v. *Thompson*, 811 F.2d 841, 845 n.4 (5th Cir. 1987).

[7] The district court observed in part that (Pet. App. 20a-21a):

> The settlement forms, which could have set the record straight as to the purpose of the loan, and also could have provided a basis for the bank to recall or change the con-

difficult to imagine a jury finding such intent while at the same time regarding the false representation as incapable of influencing the bank's actions. Finally, even assuming clear error, petitioner's conviction under Section 1014 did not amount to a "miscarriage of justice" warranting reversal, *Olano*, 113 S. Ct. at 1778-1779, given the jury's finding that petitioner sought to influence the lending decision of Bedford Savings through his false statement, and the findings by both the district court and the court of appeals that petitioner's false representation was in fact material. Pet. App. 7a, 20a-21a.

In sum, we believe that materiality is not an element of the offense described in Section 1014, and, even if it is an element, the failure to instruct on materiality in this case did not rise to the level of plain error. Nevertheless, because the proper disposition of this case could be affected by the resolution of *United States* v. *Wells*, *supra*, the petition here should be held for that case. If the Court grants the petition in *Wells*, the petition here should be disposed of in light of the Court's decision in *Wells*. If, however, the Court denies the petition in *Wells*, the Court should remand this case to the court of appeals for further consideration in light of *Gaudin*.[8]

> ditions on the loan, again concealed and misrepresented the purpose of more than one-quarter of the loan. One of the bank employees involved in approving the loan testified that the bank would not have loaned [petitioner] the money knowing that part of the funds were to be used to make a loan to a second company. The Court determines that under the circumstances, the false statement on the settlement forms was material.

[8] That disposition would be consistent with the dispositions in other cases in which this Court has granted the petition,

2. Petitioner also contends (Pet. 26-29) that Count 2, charging bank fraud in violation of 18 U.S.C. 1344, and Count 3, charging petitioner with making a false statement to the bank in violation of 18 U.S.C. 1014, are multiplicitous, and that his conviction and punishment on both counts therefore violates the Double Jeopardy Clause.[9]

In the context of a single prosecution, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); see *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981). Thus, the question whether multiple convictions arising from a single prosecution violate the Double Jeopardy Clause is solely one of legislative intent. See, *e.g.*, *United States* v. *Woodward*, 469 U.S. 105, 108-109 (1985) (per curiam); *Albernaz*, 450 U.S. at 340. In federal prosecutions, it is presumed in the absence of evi-

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vacated the judgment, and remanded to the court of appeals for further consideration in light of *Gaudin*, despite the fact that the issue would be reviewed by the court of appeals only for plain error. See *Gatewood* v. *United States*, 116 S. Ct. 510 (1995) (conviction under 18 U.S.C. 1001); *Waldron* v. *United States*, 116 S. Ct. 333 (1995) (conviction under 18 U.S.C. 1014); *Knapp* v. *United States*, 116 S. Ct. 666 (1995) (conviction under 26 U.S.C. 7206).

[9] The sentence of 24 months' imprisonment imposed on Count 3 was ordered to run concurrently with the sentence of 46 months' imprisonment imposed on each of the other counts of conviction, including Count 2. The sentence on Count 3 is not concurrent with the sentence imposed on Count 2 only with respect to the $50 special assessment imposed on each count of conviction. Pet. App. 28a-30a. See *Ray* v. *United States*, 481 U.S. 736 (1987) (concurrent sentence doctrine inapplicable where separate special assessment imposed on each count).

dence to the contrary that Congress intends to permit multiple convictions for a single act that violates two statutes if each statute "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); see *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). Under the *Blockburger* test, the statutory elements of the offense govern; the fact that in a particular case there was an overlap in the proof offered to establish the crimes is irrelevant. *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

Sections 1014 and 1344 describe separate offenses under the *Blockburger* test. A conviction under Section 1014 requires proof of facts not required to prove bank fraud. Specifically, to violate Section 1014, a defendant must have made a false statement, and that false statement must have been made for the purpose of influencing the bank's action on a loan or other specified financial transaction. Proof of a false statement intended to influence a loan decision is not necessarily required for a conviction under the Section 1344 bank fraud statute. Similarly, a conviction under Section 1344 requires proof of a specific intent to defraud, while Section 1014 requires only an intent to induce action on the part of the bank, without the necessity of an intent to defraud.

Petitioner's reliance (Pet. 26-29) on *United States* v. *Seda*, 978 F.2d 779 (2d Cir. 1992), is misplaced. In *Seda*, the Second Circuit held that an indictment was multiplicitous in charging the defendant with violating Section 1344, and in separate counts with violating Section 1014, where both sets of charges were based upon the same false statements alleged to have been made to a bank. 978 F.2d at 780-782. We disagree with that holding, for the reasons set forth in the

dissenting opinion in *Seda*. As the dissent explained, the majority in *Seda* erred when, in applying the *Blockburger* test, it considered the facts of the case before it. 978 F.2d at 782-783 (Kearse, J., dissenting). In any event, as both courts below observed, *Seda* is distinguishable because the Section 1344 bank fraud charge in this case was not based solely on the specific false representation that formed the basis for the Section 1014 count, but was based on a continuing course of fraudulent conduct over several months. Pet. App. 10a, 14a; see *id.* at 75a-77a.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition in *United States* v. *Wells*, and then disposed of accordingly.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1995

JAMES LINSCOMB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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STATEMENT

The Government incorrectly states "On Willey's advice petitioner directed the title company to change the papers and to create a second settlement statement indicating that the excess funds would go to another corporation, Foxhall, Inc., purportedly to pay off a second lien on the property." (Brief for the United States at 3) ("Govt. Brief"). There is no such testimony in the Record. On the contrary, Petitioner testified at trial that the "payoff second lien" notation was added without his knowledge or agreement. (Rec. Vol. 6, pp. 166, 196). Petitioner asked the closer to show on the settlement statement that a check from the loan proceeds would be made to Foxhall, Inc., (but not to pay off a second lien). (Rec. Vol. 5, pp. 93-94).

The Government also incorrectly states that the court of appeals held that petitioner's **false statement** was "clearly material". Govt. Brief 4. The opinion states that petitioner's **deception** was "clearly material." Pet. App. 7a.

The Government incorrectly asserts that petitioner's *Gaudin* claim was "belatedly raised by petitioner." Govt. Brief 5. This Court's decision in *Gaudin* was issued June 19, 1995. Petitioner's Letter Brief was filed in the court of appeals June 29, 1995. At that time, Petitioner's Motion for Rehearing was pending before the court of appeals; the *Gaudin* decision, and its applicability to this case, was brought to the attention of the court of appeals by Petitioner prior to any ruling on the Motion for Rehearing. Pet. App. 45a.

ARGUMENT

I.

THE GOVERNMENT'S PROPOSED CONSTRUCTION OF 18 U.S.C. § 1014 CONFLICTS WITH CIRCUIT PRECEDENT

Contrary to the Government's proposed construction of 18 U.S.C. § 1014, materiality is an essential element of the offense; therefore, *Gaudin* applies to a § 1014 conviction. Based upon *Gaudin*, the Eighth and Ninth Circuits reversed convictions under § 1014 where the issue of materiality had not been sent to the jury. See *United States v. Wells*, 63 F.3d 745 (8th Cir.) (reversing a § 1014 conviction for *Gaudin* error), *reh'g denied* (November 2, 1995); *United States v. Nash*, 64 F.3d 504 (9th Cir. 1995) (finding that *Gaudin* error was plain error and reversing a § 1014 conviction), *petition for reh'g en banc granted*.[1] Moreover, this Court granted certiorari in *Waldron v. United States*, 116 S.Ct. 333 (1995) (reversing a § 1014 conviction and remanding the case to the Fifth Circuit Court of Appeals for further consideration in light of *Gaudin*.)

After conceding in its Brief to the Fifth Circuit that materiality is an element of § 1014 (Govt. Fifth Cir. Brief 26, 29-30), the Government now claims that materiality is not an element of the offense. Govt. Brief 6. If the Government's altered position is correct, ten circuits are wrong. Moreover, no post *Gaudin* court has accepted the Government's analysis of § 1014. On January 31, 1996, the Government filed a Petition For A Writ Of Certiorari presenting that issue in *United States v. Wells*, 63 F.3d 745

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[1] Opinion withdrawn, (opinion filed February 6, 1996 after rehearing *en banc* reversing all Nash's convictions, including a § 1344 bank fraud conviction where the court decided materiality as a matter of law).

(8th Cir. 1995), petition for cert. pending, No. 95-1228 (filed Jan. 31, 1996). Govt. Brief 7, n. 4. The *Wells* court held that the trial court's determination of materiality denied the defendant's constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under § 1014.

Contrary to the Government's arguments, this case would provide an appropriate vehicle to resolve that question because the issue was raised by the Government in this case in the court below, Pet. App. 5a, and was before the Fifth Circuit Court of Appeals on petitioner's Motion for Rehearing which was pending when *Gaudin* was decided by this Court. Although it had previously conceded that materiality was an element of the offense in the Fifth Circuit, the Government responded to *Gaudin* in the court of appeals by arguing that materiality was not an element of § 1014 and therefore *Gaudin* did not apply in this case. The Government argued that because materiality was a "judge made" limitation, it need not be submitted to the jury. Pet. App. 54a. The Fifth Circuit's opinion was silent with respect to the *Gaudin* decision, however, it is highly unlikely that the court of appeals was persuaded by the Government's proposed construction of § 1014. It would be appropriate for this Court to resolve that issue by granting plenary review of this case. Resolution of the issue by this Court would obviate the necessity of numerous courts of appeals' trying to reconcile the Government's § 1014 construction with prior circuit precedents, and with *Gaudin*.

II.

THE QUESTION LEFT OPEN IN *OLANO* AND RAISED BY THE GOVERNMENT IN THIS CASE – DOES PLAIN ERROR ANALYSIS APPLY WHERE ERROR UNCLEAR AT TRIAL BECOMES CLEAR ON APPEAL – WARRANTS A GRANT OF CERTIORARI

The Government claims that Linscomb's failure to object at trial makes this only a "plain error case," citing *United States v. Olano*, 113 S.Ct. 1770, 1775-1779 (1993). However, *Olano* specifically did not address the situation presented here, in which intervening law after the trial renders the trial proceedings erroneous. The Government's statement, Govt. Brief 8, n. 6, implying that the court of appeals did not have the opportunity to follow this Court's decision in *Gaudin* is erroneous. Although the court of appeals' decision in this case was issued before the *Gaudin* decision, this case was still pending before the court of appeals on a Motion for Rehearing at the time the *Gaudin* decision was issued. The Fifth Circuit could have granted rehearing in this case and addressed the *Gaudin* issues raised by Petitioner in support of his Motion for Rehearing. Under existing circuit precedent that materiality was an element of a false statement offense, it should have been clear and obvious to the Fifth Circuit that *Gaudin* required that issue to be decided by the jury and not the court.

The *Olano* Court noted that "[w]e need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." 113 S.Ct. at 1777. Such a "special case" is now before this Court and presents an appropriate vehicle to address the "clarified law" exception to

Olano. Moreover, this is the kind of error alluded to in *Olano* that should be presumed prejudicial whether or not there is a specific showing that the error "affected substantial rights." *Id.* at 1778. And even if a showing of "prejudice" is required, the fact that a rational jury could have resolved the materiality issue in favor of Petitioner established that Petitioner was harmed by failing to give the jury the opportunity to do so. Plenary review of these issues in this case would resolve this important and unanswered question of federal criminal and constitutional law.

The Government argues that the court's instructions on the false statement charge in this case preclude a finding that the false statement was "not material." Such a contention is without merit. Other instructions cannot serve as an acceptable substitute for the court's failure to submit "materiality" to the jury; the court's instructions to the jury on the false statement count did not obviate the constitutional proportion or impact of the *Gaudin* error claimed by petitioner and ignored by the court of appeals *post-Gaudin*.

III.

PETITIONER'S CONVICTION FOR § 1344 BANK FRAUD IS INVALID UNDER *GAUDIN* AND CONFLICTS WITH *UNITED STATES V. SEDA*

The court's instructions to the jury on the § 1344 Bank Fraud count, were tied to the false statement made the basis of the § 1014 conviction. The result was that the jury convicted Linscomb of bank fraud based upon a false statement which was not found to be material beyond a reasonable doubt by the jury. The § 1344 conviction is invalid under *Gaudin*.

In following the court's instructions on the bank fraud count, the jury could not avoid convicting Petitioner of a violation of § 1344 if it had found a violation of § 1014. The instructions charged the jury that the "scheme" and "artifice" elements of the offense included a "fraudulent . . . **representation**" [used to obtain money or property] "by defrauding a federally . . . insured financial institution;" or [obtaining money] by means of "**false** or fraudulent pretenses, **representations,** . . . " [emphasis supplied]. Thus, if the jury found a § 1014 False Statement violation, it would follow almost automatically that a § 1344 violation would be found as well. Petitioner claims that the same conduct, i.e., the false statement "payoff second lien," was the basis for both the § 1014 and the § 1344 charges against him. The issue here is not simply an overlap in the proof offered, as the Government contends. Govt. Brief 11.

The Government essentially argues that proof of a false statement intended to influence a loan decision under § 1014 is not sufficient for a conviction under the § 1344 bank fraud statute. Both § 1014 and § 1344 proscribe the use of deceptive means to procure loans from federally insured banks. While § 1014 requires proof of a material fact that is not required by § 1344 – a false statement or report on any loan application or similar document – the factual requirements of § 1344 will always be satisfied by conduct that violates § 1014 in the manner that Congress intended in enacting the statute. The *Blockburger* test is a means of ascertaining whether the two offenses are sufficiently distinguishable from one another so that it is reasonable to infer that Congress intended to authorize multiple punishments. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Sections 1014 and

1344 are not sufficiently distinguishable to draw such an inference.

To prove a violation of § 1014, it must be shown that a false statement was made to influence the actions of the bank. Such proof will always constitute a scheme or artifice to defraud a bank in violation of § 1344, except arguably in the extremely narrow situation hypothesized by the Government and rejected by the Second Circuit in *United States v. Seda*, 978 F.2d 779 (2d Cir. 1992) – where a person makes a false statement on a loan application to insure its rejection. Congress specifically considered the reach of § 1014 and chose to enact § 1344 not to provide a separate offense for multiple punishment of conduct already covered by § 1014, but rather to create a federal offense to punish conduct beyond the reach of § 1014. *See Legislative History to Public Law* 98-473, 98th Congress, Second Session, 1984 *United States Code Congressional and Administrative News*, p. 3518. Since § 1014 and § 1344 were "addressed to the same concerns and designed to combat the same problem," *Simpson v. United States*, 435 U.S. at 10 and 15, it must be assumed that Congress did not intend multiple punishments under these two statutes. *See id.*

Congress's purpose in enacting § 1344 was to punish conduct not covered by § 1014 and not to provide a vehicle to obtain multiple convictions and punishments for conduct that is punishable by § 1014. If the legislative history leaves any doubt that this was Congress's intent, the rule of lenity dictates that ambiguity be resolved so as to not allow multiple convictions and punishment for conduct that violates both § 1014 and § 1344. *See Albernaz v. United States*, 450 U.S. at 342; *Whalen v. United States*, 445 U.S. at 694; *Simpson v. United States*, 435 U.S. at 14-15.

The Fifth Circuit distinguished *Seda* in this case on the grounds that the acts constituting the § 1014 violation were not the "sole basis" of the § 1344 conviction. This "sole basis" test is invalid under the reasoning of *Blockburger, supra,* and *Whalen, supra.* The Government in this case simply disagrees with the Second Circuit's holding in *Seda,* citing the dissenting opinion in that case as support for its position. Govt. Brief 12.

The Fifth Circuit's decision conflicts with the Second Circuit's decision in *Seda* and independently of Petitioner's contentions under *United States v. Gaudin,* this Court should grant certiorari to resolve this conflict.

CONCLUSION

Certiorari should be granted. Either plenary review, or a remand in light of *Gaudin,* should be accorded.

Respectfully submitted,

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